90-883

Supreme Court, U.S.
FILED
NOV 2 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1990

LEONARD C. JOHNSON, C.R.N.A.,
LUTHER HOSPITAL, ST. PAUL FIRE &
MARINE INSURANCE CO., AND WISCONSIN
PATIENT COMPENSATION FUND,

Petitioners,

vs.

RICKY F. RINECK, INDIVIDUALLY AND
AS SURVIVING HUSBAND OF JOY E. RINECK
AND AS GUARDIAN FOR RACHEL J. RINECK,
A MINOR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

PETITION

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QUESTION PRESENTED

Whether or not, in statutorily-created actions for wrongful death, the Wisconsin Supreme Court's interpretation of a statute, intended to place a "cap" on damages awarded in medical malpractice actions, is repugnant to the Equal Protection Clause of the United States Constitution, when the interpretation actually imposes higher limits of damage liability on health care providers than on other citizens?

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Leonard C. Johnson, C.R.N.A., Luther Hospital, St. Paul Fire & Marine Insurance Co., and Wisconsin Patient Compensation Fund, the Petitioners herein,[1] pray that a Writ of Certiorari issue to review the decision of the Wisconsin Supreme Court filed in the above-captioned matter on June 14, 1990:

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court in this matter is reported as Rineck v. Johnson, 155 Wis. 2d 659, 456 N.W.2d 336 (1990) and is reprinted in Petitioners' Appendix at Page A-1.

The order of the Wisconsin Supreme Court denying Petitioners' Motion for Reconsideration is unreported and is reprinted in Petitioners' Appendix at Page A-16.

The opinion of the Wisconsin Court of Appeals in this matter is reported at Rineck v. Johnson, 150 Wis. 2d 232, 440 N.W.2d 830 (App. 1989), and is reprinted in Petitioners' Appendix at Page A-38.

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[1]

PARTIES TO THE PROCEEDING

All of the parties to this proceeding are identified in the caption. Pursuant to Rule 29.1, petitioners make the following statement regarding the parent or subsidiary corporations of parties to this proceeding: Luther Hospital is wholly-owned by Luther Regional Health Systems, Inc., and has no subsidiaries; St. Paul Fire & Marine Insurance Company is wholly-owned by St. Paul Companies, Inc., and has no subsidiaries; and Wisconsin Patient Compensation Fund has neither parent nor subsidiary corporations.

The unreported memorandum opinion of the Circuit Court for Chippewa County, Wisconsin is reprinted in Petitioners' Appendix at Page A-49.

JURISDICTION

The opinion of the Wisconsin Supreme Court was filed on June 14, 1990. Appendix, Page A-1. A timely motion for reconsideration was denied by order of the Wisconsin Supreme Court on September 13, 1990. Appendix, Page A-16.

The jurisdiction of the United States Supreme Court is invoked pursuant to 28 USC Sec. 1257(a) on the ground that the application of a state statute by the Wisconsin Supreme Court is repugnant to the Constitution of the United States.

Further, 28 USC Sec. 2403(b) may be applicable, and copies of the Petition for Writ of Certiorari to the Wisconsin Supreme Court shall be served upon the Attorney General of the State of Wisconsin.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Fourteenth Amendment to the United States Constitution: Equal Protection Clause

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, with-

out due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sections 895.04(1) and 895.04(4), Wis. Stats.: Wisconsin Wrongful Death Statute (Pertinent Sections)

895.04 Plaintiff in wrongful action. (1) An action for wrongful death may be brought by the personal representative of the deceased person or by the person to whom the amount recovered belongs.

. . .

(4) Judgment for damages for pecuniary injury from wrongful death may be awarded to any person entitled to bring a wrongful death action. Additional damages not to exceed $50,000 for loss of society and companionship may be awarded to the spouse, children or parents of the deceased.

Sections 655.017 and 893.55(4), Wis. Stats.: Wisconsin "Cap" On Damages Against Health Care Providers

655.017 Limitation on noneconomic damages. The amount of noneconomic damages recoverable by a claimant or plaintiff under this chapter for acts or omissions of a health care provider if the action is filed on or after June 14, 1986 and before January 1, 1991, and for acts or omissions of an employe of a health care provider, acting within the scope of his or her employment and providing health care services, for actions filed on or after June 14, 1986 and before January 1, 1991, is subject to the limit under s. 893.55(4).

893.55(4)(a) In this subsection, "noneconomic damages" means moneys intended to compensate for pain and suffering; humiliation; embarrassment; worry; mental distress; noneconomic effects of disability including loss of enjoyment of the normal activities, benefits and pleasures of life and loss of mental or physical health, well-being or bodily functions; loss of consortium, society and companionship; or loss of love and affection.

(b) The total noneconomic damages recoverable under ch. 655 for bodily injury or death, including any action or proceeding based on contribution or indemnification, may not exceed the limit under par.(d) for each occurrence from all health care providers and all employes of health care providers acting within the scope of their employment and providing health care services who are found negligent and from the patients compensation fund for any action filed on or after June 14, 1986 and before January 1, 1991.

(c) A court in an action tried without a jury shall make a finding as to noneconomic damages without regard to the limit under par.(d). If noneconomic damages in excess of the limit are found, the court shall make any reduction required under s. 895.045 and shall award as noneconomic damages the lesser of the reduced amount or the limit. If an action is before a jury, the jury shall make a finding as to noneconomic damages without regard to the limit under par.(d). If the jury finds that noneconomic damages ex-

ceed the limit, the jury shall make any reduction required under s. 895.045 and the court shall award as noneconomic damages the lesser of the reduced amount or the limit.

(d) The limit on total noneconomic damages for each occurrence under par.(b) shall be $1,000,000 for actions filed on or after June 14, 1986, and shall be adjusted by the director of state courts to reflect changes in the consumer price index for all urban consumers, U.S. city average, as determined by the U.S. department of labor, at least annually thereafter, with the adjusted limit to apply to awards subsequent to such adjustments.

(e) Economic damages recovered under ch. 655 for bodily injury or death, including any action or proceeding based on contribution or indemnification, shall be determined for the period during which the damages are expected to accrue, taking into account the estimated life expectancy of the person, then reduced to present value, taking into account the effects of inflation.

STATEMENT OF THE CASE

The material facts of this matter are undisputed. In January, 1986, Joy E. Rineck presented at Luther Hospital in Eau Claire, Wisconsin. Ms. Rineck was in labor. Due to various complications, an emergency cesarean section was required to deliver her daughter, Rachel Rineck. Petitioner, Leonard Johnson, C.R.N.A., was the nurse-anesthesiologist

during the surgery, and was allegedly negligent during the anesthetic management of the cesarean procedure. On February 4, 1986, Joy E. Rineck died as a result of the alleged negligence of Johnson.

In the State of Wisconsin, an action for wrongful death is purely statutory, and no right of recovery existed at common law. Steinbarth v. Johannes, 144 Wis. 2d 159, 163, 423 N.W.2d 540 (1988). The Wisconsin legislature established the action for wrongful death in Wisconsin by enacting what is now Sec. 895.03, Wis. Stats. (1987-88). An action for wrongful death is designed to compensate for the loss of the relational interest existing between the beneficiary and the decedent. Weiss v. Regent Properties, Ltd., 118 Wis. 2d 225, 230, 346 N.W.2d 766 (1984). Wisconsin's wrongful death statute expressly limits the liability of an alleged wrongdoer for damages for the loss of society and companionship of the decedent. Section 895.04(4), Wis. Stats. (1987-88), limits the recovery of damages for such loss to a maximum of $50,000.

In 1975, the Wisconsin legislature enacted Chapter 655, Wis. Stats. (1987-88), which subjects every claim for injury or death caused by medical malpractice to the provisions of that chapter. Sec. 655.007, Wis. Stats. (1987-88). In June, 1986, the Wisconsin legislature enacted certain amendments and modifications to Chapter 655. Section 655.017, Wis. Stats., established a limitation, or "cap," on noneconomic damages recoverable for the acts or omissions of a health care provider. Those limitations

are set out in Sec. 893.55(4), Wis. Stats. (1987-88). Section 893.55(4)(a) defines noneconomic damages as:

> [M]oneys intended to compensate for pain and suffering; humiliation; embarrassment; worry; mental distress; noneconomic effects of disability including loss of enjoyment of the normal activities, benefits and pleasures of life and loss of mental or physical health, well-being or bodily functions; loss of consortium, society and companionship; or loss of love and affection. (emphasis supplied)

Subsection (4)(b) of 893.55 further provides, inter alia that:

> The total noneconomic damages recoverable under ch. 655 for bodily injury or death, including any action or proceeding based on contribution or indemnification, may not exceed the limit under par. (d) for each occurrence from all health care providers and all employes of health care providers acting within the scope of their employment and providing health care services who are found negligent and from the patients compensation fund for any action filed on or after June 14, 1986 and before January 1, 1991. (emphasis supplied)

Finally, Subsection (4)(d) of 893.55 provides, in pertinent part:

> The limit on total noneconomic damages for each occurrence under par. (b) shall be $1,000,000 for actions filed on or after June 14, 1986. . . . (emphasis supplied)

When enacting Chapter 655, Wis. Stats., the Wisconsin legislature was attempting to respond to a perceived "medical malpractice crisis" in the State of Wisconsin. State ex rel. Strykowski v. Wilkie, 81 Wis. 2d 491, 508, 261 N.W.2d 434 (1978). Among other provisions, the Wisconsin legislature mandated that every health care provider practicing in the State of Wisconsin is required to maintain proof of financial responsibility (generally through "health care providers' professional liability insurance"). Sec. 655.23, Wis. Stats. (1987-88). The legislature also created a Patients Compensation Fund for the purpose of paying that portion of any medical malpractice claim which is in excess of the statutorily-set liability limits contained in any health care provider's professional liability insurance. Sec. 655.27, Wis. Stats. (1987-88).

At the time of the death of Joy E. Rineck, petitioner, Leonard Johnson, C.R.N.A., as an employee of petitioner, Luther Hospital, was afforded "health care providers' professional liability insurance" by a policy issued to Luther Hospital by petitioner, St. Paul Fire & Marine Insurance Company. The limits of that liability insurance policy were the sum of $200,000. By virtue of their status as "health care providers" within the meaning of Chapter 655, Wis. Stats., both petitioner, Johnson, and petitioner, Luther Hospital, are protected against liability for medical malpractice in excess of their insurance policy limits by the petitioner, Wisconsin Patients Compensation Fund. See Secs. 655.23(5), 655.23(5m), and 655.27(1), Wis. Stats. (1987-88).

On April 28, 1986, the respondent, Ricky F. Rineck, pursuant to the provisions of Chapter 655, Wis. Stats., commenced a Patients Compensation Panel proceeding against the petitioners, health care providers, Johnson and Luther Hospital, alleging that the negligence of the health care providers caused the wrongful death of Joy E. Rineck. Pursuant to certain amendments and modifications of Chapter 655, Wis. Stats., which became effective on June 14, 1986, the action was transferred from the Wisconsin Patients Compensation Panel to the Chippewa County Circuit Court on July 10, 1986. Petitioners, St. Paul Fire & Marine Insurance Company and the Wisconsin Patients Compensation Fund, were added as parties to the proceedings, pursuant to Wisconsin law.

In May, 1988, the claims of medical malpractice arising out of the death of Joy E. Rineck were tried before the Chippewa County Circuit Court and jury. The jury awarded Ricky F. Rineck the total sum of $658,987 as damages resulting from the death of his wife, Joy E. Rineck. Of this sum, $250,000 was allocated by the jury as compensation for his loss of society and companionship. At motions after verdict, trial counsel for the health care providers and their insurance carriers made a motion to reduce the damage award for loss of society and companionship of the decedent to the sum of $50,000, the statutory limit established by Sec. 895.04(4), Wis. Stats., the wrongful death statute. The trial court denied the motion, and granted Ricky F. Rineck a judgment which included the $250,000 award for the loss of society and companionship of his deceased

spouse. Petitioners appealed that part of the award to the Wisconsin Court of Appeals.

In a published decision, the Wisconsin Court of Appeals, District III, held that Sec. 895.04(4), Wis. Stats., limits recovery for loss of society and companionship in a wrongful death action to $50,000, and reversed that part of the trial court's judgment. Rineck v. Johnson, 150 Wis. 2d 232, 440 N.W.2d 830 (Ct. App. 1989). The court of appeals held that "loss of society and companionship" is one of the seven types of noneconomic loss identified by the "cap" statute, Sec. 893.55(4)(a), Wis. Stats. (1987-88). The court of appeals also held that the wrongful death statute could be reconciled with the "cap" statute, and that the Wisconsin legislature did not intend to remove the well-established damage limitations of wrongful death in cases involving medical malpractice. The decision of the court of appeals was unanimous.

Ricky F. Rineck appealed this decision to the Wisconsin Supreme Court. The Wisconsin Supreme Court overturned the decision of the court of appeals. Rineck v. Johnson, 155 Wis. 2d 659, 456 N.W.2d 336 (1990). The Wisconsin Supreme Court held that the Wisconsin legislature, by enacting the "cap" on damages in medical malpractice actions, intended to create two different classifications of actions for wrongful death: (1) wrongful death actions against health care providers, Secs. 655.017 and 893.55(4), Wis. Stats.; and (2) wrongful death actions against all other citizens. Sec. 895.04, Wis. Stats. Pursuant to this interpretation by the Wisconsin Supreme Court, in statuto-

rily-created actions for wrongful death, Wisconsin law now subjects health care providers to liability of up to $1,000,000 for damages resulting from the loss of society and companionship of a decedent, while all other citizens are limited to liability of no more than $50,000 for the same claim.

Petitioners filed a Motion for Reconsideration in the Wisconsin Supreme Court on July 3, 1990, within the time limit provided by Wisconsin Statutes. The sole basis of the motion for reconsideration was that the new interpretation of the statutes violated the Equal Protection Clauses of the Wisconsin and United States Constitution. The motion for reconsideration was denied by the Wisconsin Supreme Court by an Order dated September 13, 1990. At no time prior to the motion for reconsideration was the equal protection argument addressed. In the court of appeals, the case had been treated as a straightforward case of statutory interpretation, and a unanimous court of appeals had reconciled the statutes in question and maintained a single class of wrongful death actions. Moreover, petitioners had no interest in challenging the constitutionality of any of the statutes involved, because the wrongful death statutory limitation and the statutory cap on noneconomic damages could clearly be reconciled. Indeed, it is the position of the petitioners that, absent the decision of the Wisconsin Supreme Court in this case, all of the statutes are, in fact, constitutional. It is only the unanticipated interpretation of the "cap" statute by the Wisconsin Supreme Court which creates the two classifications of wrongful death actions, which

are repugnant to the Equal Protection Clause of the United States Constitution.

ARGUMENT

As recognized by Justice White in his dissent to the dismissal of the appeal in Fein v. Permanente Medical Group, 474 U.S. 892 (1985), there is national concern over the "medical malpractice crisis" and widespread efforts by state legislatures and state courts to respond to this perceived "crisis." This case affords the United States Supreme Court a narrow framework in which to both remedy an obviously unconstitutional ruling and to consider constitutional questions raised by the numerous attempts of state legislatures to "cap" damages in certain kinds of tort actions.

The legislature of the State of Wisconsin has created a cause of action for wrongful death, enabling persons to assert claims for damages resulting from death caused by tortious conduct. As a part of this statutory cause of action, the legislature has established a $50,000 limit on the amount of money that can be recovered on a claim for loss of society and companionship. The supreme court of the State of Wisconsin has now ruled that, in actions against health care providers, a different statute intended to "cap" damage awards actually raises to $1,000,000 the limit on the amount that can be recovered for loss of society and companionship resulting from death. These statutory classifications are clearly unequal. Within this fairly narrow context, the United States Supreme Court can

determine whether these unequal classifications are constitutional, and in so doing, give guidance to courts and legislatures throughout the country on an issue of widespread interest and import.

I. THE DECISION OF THE WISCONSIN SUPREME COURT CREATES CONSTITUTIONALLY INVALID CLASSIFICATIONS.

A. Wrongful Death Actions Are Purely Statutory.

It is well-settled in Wisconsin that an action for wrongful death is purely statutory. The wrongful death statute abrogated common law in order to create a cause of action for the loss sustained by the decedent's dependents. No right of recovery existed at common law. Steinbarth v. Johannes, 144 Wis. 2d 159, 163, 423 N.W.2d 540 (1988). The Wisconsin Supreme Court has consistently held that an action for wrongful death is strictly limited to compensation for the loss of the relational interest existing between the statutorily-identified beneficiaries and the decedent. Weiss v. Regent Properties, Ltd., 118 Wis. 2d 225, 230, 346 N.W. 2d 766 (1984); Hanson v. Valdivia, 51 Wis. 2d 466, 473, 187 N.W.2d 151 (1971).

In the courts below, counsel for Ricky Rineck argued that the statutes governing medical malpractice actions in Wisconsin created a new, separate cause of action for wrongful death caused by health care providers. Petitioners viewed the case - and the Wisconsin

Court of Appeals unanimously agreed - as a straightforward matter of statutory interpretation, in which the well-established rules governing actions for wrongful death were to be harmonized with the procedures governing medical malpractice actions. The court of appeals concluded that, in enacting sec. 893.55(4), the Wisconsin legislature did not create any separate cause of action for wrongful death. The clear purpose of the statute was to protect health care providers from medical malpractice claims not to create new and additional causes of action. Were it to create a separate cause of action, it would increase the number of such claims rather than protect against them.

B. The "Rational Basis" Test Is The Appropriate Standard of Review.

When Chapter 655, Wis. Stats., which governs medical malpractice claims, was first enacted, it was challenged in the Wisconsin Supreme Court on a number of different grounds. See State ex rel. Strykowski v. Wilkie, 81 Wis. 2d 491, 261 N.W.2d 434 (1978). Among other things, the Wisconsin Supreme Court considered the argument that separating tort claims against health care providers from other tort claims was a violation of equal protection, and in holding that there was no constitutional violation, the court applied the "rational basis" test to the statutes. State ex rel. Strykowski v. Wilkie, 81 Wis. 2d at 506-07. This test - the least intrusive of constitutional challenges under the Equal Protection Clause - is the

appropriate test to be applied in examining the decision of the Wisconsin Supreme Court in the instant case.

The Equal Protection Clause of the United States Constitution requires equal protection and security for all persons under like circumstances. Hayes v. State of Missouri, 120 U.S. 68, 71 (1887). The protection afforded by the equal protection provision of the Wisconsin Constitution is substantially equivalent to the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. Yotvat v. Roth, 95 Wis. 2d 357, 363 n.1, 290 N.W.2d 524 (Ct. App. 1980). Traditionally, two standards have been applied when a statute, or its application, is challenged on equal protection grounds.

The "strict scrutiny" test is applied when the case involves a suspect classification or a fundamental right. Suspect classifications are those involving race, McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964); ancestry, Oyama v. California, 332 U.S. 633, 644-46 (1948); and alienage, Graham v. Richardson, 403 U.S. 365, 372 (1971). Fundamental rights include privacy, Roe v. Wade, 410 U.S. 113, 154-64 (1973); marriage, Zablocki v. Redhail, 434 U.S. 374, 383-87 (1978); voting, Bullock v. Carter, 405 U.S. 134, 144 (1972); travel, Shapiro v. Thompson, 394 U.S. 618, 627 (1969); and freedom of association, N.A.A.C.P. v. Alabama, 357 U.S. 449, 460-62 (1958). In Munn v. Illinois, 94 U.S. 113, 134 (1877), the United States Supreme Court held that a person has no property right or vested interest in any rule of common law. Since the right to recover in a personal injury

action is generally a part of the common law, it is not a fundamental right under the Constitution.

The "rational basis" test is used to analyze economic or social legislation which does not involve either a suspect classification or a fundamental right. Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 82-84, 93-94 (1978); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). Under the "rational basis" test, a challenged classification must rationally relate to a legitimate state interest. See McGowan, 366 U.S. at 425. Under this "rational basis" test, the Court will give broad authority to a state legislature to establish different classifications in economic and social legislation. As the Court noted in McGowan:

> The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any statement of facts reasonably may be conceived to justify it.
>
> Id. at 425.

In considering statutes which provide that medical malpractice victims are treated differently than victims of other torts, the Fourth, Fifth, Eighth, and Ninth Circuits have all applied the "rational basis" test. See Hoffman v. United States, 767 F.2d 1431, 1435-36

(9th Cir. 1985); Fitz v. Dolyak, 712 F.2d 330, 332 (8th Cir. 1983); DiAntonio v. Northampton-Accomack Memorial Hosp., 628 F.2d 287, 291 (4th Cir. 1980); and Woods v. Holy Cross Hosp., 591 F.2d 1164, 1173 (5th Cir. 1979). Even under this standard of review, however, the interpretation of the Wisconsin Supreme Court of Wisconsin's "cap" on noneconomic damages in medical malpractice claims is repugnant to the Equal Protection Clause of the United States Constitution.

C. The Statutory Classifications Created By The Wisconsin Supreme Court's Decision Are Repugnant To The Equal Protection Clause.

Prior to the enactment of the "cap" statute in 1986, there was no limitation on noneconomic damages in medical malpractice actions in Wisconsin. Wisconsin, like numerous other states in the nation, enacted a statutory "cap" on noneconomic damages as a legislative response to a perceived medical malpractice insurance crisis. See Comment, The Constitutionality of Wisconsin's Noneconomic Damage Limitation, 72 Marq. L. Rev. 235 (1989). As noted in this Comment,

> Between 1960 and 1970, insurance rates for physicians increased dramatically. Rates for non-surgical physicians increased an average of 540.8%, while the rates for surgical physicians increased an astounding 949.2%.
>
> 72 Marq. L. Rev. at 235.

The rationale for "caps," or limitations on damages in medical malpractice cases, was explained by the California Supreme Court in Fein v. Permanente Medical Group, 211 Cal. Rptr. 368, 695 P.2d 665, 680 (1985), appeal dismissed, 474 U.S. 892 (1985):

> [I]n enacting [the statute] the Legislature was acting in a situation in which it had found that the rising costs of medical malpractice insurance was posing serious problems for the health care system in California, threatening to curtail the availability of medical care in some parts of the state and creating the very real possibility that many doctors would practice without insurance, leaving patients who might be injured by such doctors with the prospect of uncollectible judgments. In attempting to reduce the costs of medical malpractice insurance . . . , the Legislature enacted a variety of provisions affecting doctors, insurance companies and malpractice plaintiffs.

The United States Court of Appeals for the Ninth Circuit also considered the California "cap" on noneconomic damages in medical malpractice actions, and found that "[i]t was reasonable for the lawmakers to believe that placing a ceiling on noneconomic damages would help reduce medical malpractice insurance premiums." Hoffman v. United States, 767 F.2d at 1437.

Clearly, by enacting Sec. 893.55(4), Wis. Stats., the Wisconsin legislature sought to deal with the perceived medical malpractice crisis by limit-

ing, and not expanding, the liability of health care providers. Clearly, the "legislative purpose" behind the statute was to limit the liability of a health care provider, in order to help reduce medical malpractice insurance premiums, and thereby ameliorate the perceived medical malpractice liability crisis. In so doing, the "cap" statute furthered the legitimate state interest of ensuring the availability and affordability of medical care. As the Wisconsin Court of Appeals noted in its unanimous decision in this case, the Wisconsin legislature did not intend to expand the liability of health care providers, or remove any previously imposed limits on damages recoverable in wrongful death actions. Rineck v. Johnson, 150 Wis. 2d at 238-39, 440 N.W.2d at 832.

It is undisputed that, prior to the enactment of the "cap" statute, Sec. 893.55(4), Wis. Stats., the wrongful death statutory limitation applied to medical malpractice/wrongful death cases. Now, under the Wisconsin Supreme Court's new interpretation of Secs. 893.55(4) and 895.04(4), Wis. Stats., the statutory limitations for loss of society and companionship ($50,000) set forth in the wrongful death statute no longer apply to medical malpractice actions. Under the new interpretation of the Wisconsin Supreme Court, the potential liability of a health care provider in a wrongful death action is increased to up to $1,000,000. In other words, the interpretation of Sec. 893.55(4), Wis. Stats., by the Wisconsin Supreme Court in this case expands the liability of health care providers in medical mal-

practice actions involving death. This interpretation is in direct conflict with the intent behind the enactment of the noneconomic statutory "cap" enacted by the legislature, i.e., to limit the liability of health care providers.

Because the decision of the Wisconsin Supreme Court interprets Sec. 893.55(4), Wis. Stats., to increase and expand the liability of health care providers in wrongful death actions, there is no rational relationship between the classification created by the court's interpretation and the clear legislative purpose behind the "cap" statute. Instead, the court's interpretation of the "cap" statute is completely contrary to the legitimate state purpose of the "cap," and, therefore, the classifications created by this interpretation of the statute violate the Equal Protection Clause to the United States Constitution.[2] There simply is no rational basis for increasing the liability of health care providers to 20 times the liability of all other citizens! The decision of the Wisconsin Supreme Court must be struck down.

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[2] The supreme court's interpretation creates two classifications in wrongful death actions: (1) actions against health care providers; and (2) actions against all other citizens.

II. THE ISSUE OF STATUTORY LIMITS ON DAMAGES IN TORT CASES IS AN ISSUE OF NATIONAL SIGNIFICANCE.

At least thirty state legislatures have at one time enacted "cap" statutes which limit, in some fashion, the amount which a litigant may receive as a damage award in various circumstances. See: ALASKA STAT. § 09.17.010 (Supp. 1986); CAL. CIV. CODE § 3333.2 (West Supp. 1989); COLO. REV. STAT. § 13-21-102 (1987 & Supp. 1988); COLO. REV. STAT. § 13-21-102.5 (1987 & Supp. 1988); FLA. STAT. ANN. § 768.80 (Harrison Supp. 1988); GA. CODE ANN. § 51-12-5.1 (Michie Supp. 1988); HAW. REV. STAT. § 663-8.7 (Supp. 1987); IDAHO CODE §§ 6-1603, -1604 (Supp. 1988); IND. CODE ANN. § 16-9.5-2-2 (West 1984 & Supp. 1988); KAN. STAT. ANN. § 60-3407 (Supp. 1988); LA. REV. STAT. ANN. § 40:1299.39 (West 1977 & Supp. 1989); LA. REV. STAT. ANN. § 40:1299.42 (West 1977 & Supp. 1989); MD. CTS. AND JUD. PROC. CODE ANN. § 11-108 (Supp. 1988); MASS. GEN LAWS ANN. Ch. 231 § 60(H) (West Supp. 1989); MICH. COMP. LAWS ANN. § 600.1483 (West Supp. 1988); MINN. STAT. ANN. § 549.23 (West 1988); MO. ANN. STAT. § 538.210 (Vernon 1968); MONT. CODE ANN. § 2-9-108 (1987); NEB. REV. STAT. § 44-2825 (1988); N.H. REV. STAT. ANN. § 508: 4-d (Supp. 1988); N.J. STAT. ANN. § 2A:53A-8 (West 1987); N.M. STAT. ANN. § 41-5-6 (1986 & Supp. 1987); N.D. CENT. CODE ANN. § 26.1-14-11 (Supp. 1987); OKLA. STAT. ANN. tit. 23, § 9

(1987 & Supp. 1989); OR. REV. STAT. ANN. § 18.560 (Butterworth 1988); PA. CONS. STAT. ANN. § 8528 (Purdon 1985 & Supp. 1988); S.D. CODIFIED LAWS ANN. § 21-3-11 (1987 & Supp. 1988); TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (Vernon Supp. 1989); TEX. REV. CIV. STAT. ANN. art. 4590(i) (Vernon Supp. 1989); UTAH CODE ANN. § 78-14-7.1 (1987 & Supp. 1988); VA. CODE ANN. § 8.01-5.81.15 (1984 & Supp. 1988); WASH. REV. CODE ANN. § 4.56.250 (1988); W. VA. CODE § 55-7B-8 (Supp. 1988); WIS. STAT. ANN. § 893.55 (West 1983 & Supp. 1988).

There have been at least fifteen reported decisions in which lower courts have wrestled with the constitutionality of these various "cap" statutes. See e.g., Virginia, Etheridge v. Medical Center Hosp., 237 Va. 87, 376 S.E.2d 525 (Va. 1989); Maryland, Franklin v. Mazda Motor Corp., 704 F. Supp. 1325 (D. Md. 1989); Washington, Sofie v. Fibreboard Corp., 112 Wash. 2d 636, 771 P.2d 711 (1989); Kansas Kansas Malpractice Victims Coalition v. Bell, 243 Kan. 333, 757 P.2d 251 (1988); Texas, Lucas v. United States, 757 S.W.2d 686 (Tex. 1988); Florida, Smith v. Department of, Ins., 507 So. 2d 1080 (Fla. 1987); California, Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985); Louisiana, Sibley v. Board of Supervisors of La. State Univ., 462 So. 2d 149 (1985), remand on motion for reconsideration, 477 So. 2d 1094 (1985); Ohio, Duren v. Suburban Community Hosp., 24 Ohio Misc. 2d 25, 495 N.E.2d 51 (C.P. Ohio 1985); Indiana, Johnson v. St. Vincent Hosp., 404 N.E.2d 585

(Ind. 1980); New Hampshire, Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980); North Dakota, Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978); Nebraska, Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977); Idaho, Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976); Illinois, Wright v. Central DuPage Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976). In some states, the statutes were overturned as unconstitutional, while in other states the statutes have been upheld. None of the cases that have analyzed the constitutionality of the cap involve the wrongful death statute limitation in conjunction with the "cap" on damages. However, most states that have caps on damages also have wrongful death statutes.

The constitutions of the individual states may afford litigants greater rights and protections than are afforded under the Constitution of the United States. See Carson v. Maurer, 424 A. 2d 825, 831 (N.H. 1980). However, it is well-settled that under an equal protection analysis, the rights afforded to litigants by the Equal Protection Clause of the United States Constitution are applicable to all of these statutorily-created classifications, and the United States Supreme Court has an opportunity in this case to enunciate guidelines which will be applicable to all of the statutes enacted by all of the various state legislatures, and all of the cases of the various lower courts which have considered the constitutionality of those statutes.

III. THIS CASE IS APPROPRIATE FOR REVIEW.

A. The Creation Of Separate and Unequal Classifications In Wrongful Death Lawsuits In Wisconsin Is Not Grounded On Any Recognized State Constitutional Principle.

As already noted above, the Wisconsin Supreme Court's interpretation of that state's "cap" on damages in medical malpractice actions has no rational basis, and is, therefore, clearly repugnant to the Equal Protection Clause of the United States Constitution under the least strict test applied by the courts. Furthermore, there is no separate and distinct basis in the Constitution of the State of Wisconsin which provides some special basis for the interpretation adopted by the Wisconsin Supreme Court. The protection afforded by the equal protection provision of the Wisconsin Constitution is substantially equivalent to the protections afforded by the Equal Protection Clause of the United States Constitution. Yotvat v. Roth, 95 Wis. 2d 357, 363 n.1, 290 N.W.2d 524 (Ct. App. 1980); In re Seraphim, 97 Wis. 2d 485, 496, 294 N.W.2d 485 (1980), cert. denied, 449 U.S. 994 (1980). There is no separate, state right or principle which permits the Wisconsin Supreme Court to ignore the protections given to all citizens by the Equal Protection Clause of the United States Constitution.

B. The Equal Protection Issue Raised By The Holding Of The Wisconsin Supreme Court In This Case Is Properly Before The United States Supreme Court.

When this case was initially considered, it appeared to be a straightforward case of statutory interpretation, in which constitutional issues did not need to be addressed. The Wisconsin Court of Appeals unanimously held that the statutory limits of liability contained in the wrongful death statutes, Sec. 895.04(4), Wis. Stats., could be harmonized with the medical malpractice "cap" statute, Sec. 893.55(4), Wis. Stats. Rineck v. Johnson, 150 Wis. 2d 232, 440 N.W.2d 830 (App. 1989). There was no need to raise the constitutional question of equal protection, because the Wisconsin Court of Appeals had no difficulty in resolving the issue by well-settled rules of statutory interpretation. After the Wisconsin Court of Appeals ruled, all citizens of Wisconsin were treated equally insofar as the damage limits imposed on loss of society and companionship in wrongful death cases.

It was Ricky Rineck, not the petitioners, who pursued the matter to the Wisconsin Supreme Court. Petitioners had no reason to challenge the constitutionality of the "cap" on medical malpractice damages, because petitioners did not believe that that statute was unconstitutional. When viewed as an attempt to limit - as opposed to increase or expand - the potential damage liability of health care providers, the

"cap" statute does bear a rational relationship to a legitimate state interest. However, when the Wisconsin Supreme Court unexpectedly turned the "cap" statute on its head, and held that it increased the potential liability for damages resulting from the loss of society and companionship of a decedent in a wrongful death action from $50,000 up to $1,000,000, this new interpretation of the "cap" statute created obvious equal protection questions.

The jurisdiction of the United States Supreme Court is properly invoked under the rule of Missouri v. Gehner, 281 U.S. 313 (1930), where the petitioner first invoked the protection of the federal Constitution on a motion for reconsideration in the State Supreme Court. In that case, the court established the principle that a claim for protection under the United States Constitution is timely, if the ruling of the highest court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it. See also Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673 (1930); Great Northern Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932).

This case was the first time that the Wisconsin Supreme Court had dealt with the "cap" statute. Petitioners immediately brought a motion for reconsideration before the Wisconsin Supreme Court, asking that court to consider the constitutional issue raised by its new interpretation of the "cap" statute. Since this was the first time that the "cap" statute had been interpreted to increase, instead of "cap" damages, it

was the first opportunity petitioners had to raise the constitutional issues in an Appellate Court of record. The record in this case demonstrates that the case was changed in the Wisconsin Supreme Court from a straightforward matter of statutory interpretation to a court ruling which created an entirely new and separate classification of wrongful death litigants.

CONCLUSION

The holding of the Wisconsin Supreme Court in this case clearly creates two separate, and unequal, classifications of wrongful death litigants. In wrongful death actions against health care providers, the defendant health care provider is subject to a liability exposure for the loss of society and companionship of the decedent in the sum of $1,000,000. For all other Wisconsin litigants, the limit on liability is the sum of $50,000 for exactly the same loss. Even under the least-strict constitutional analysis, there is no rational basis which will support this new, separate, and unequal classification established by the Wisconsin Supreme Court.

This case presents an issue of national significance. At least thirty (30) states have established "caps" on tort damage awards, and at least fifteen (15) courts of record have wrestled with the constitutional questions raised by such "cap" statutes. Moreover, virtually every state in this country has wrongful death statutes, which will impact on the application of statutory caps. The narrow framework of this case

presents the United States Supreme Court with an opportunity to provide guidelines for state legislatures and courts throughout the nation on the parameters set by the United States Constitution on an issue of continuing national importance.

For all of the foregoing reasons, petitioners respectfully request that the Supreme Court of the United States issue its Writ of Certiorari to the Supreme Court of the State of Wisconsin, and consider the constitutional issue raised by this case.

If the Court believes it would be more appropriate to allow the Wisconsin Supreme Court to consider the constitutional implications of its interpretation of Wisconsin's "cap" statute, then petitioners respectfully request that, pursuant to 28 U.S.C. Sec. 2106, the court remand this matter to the Wisconsin Supreme Court for further proceedings. See Wood v. Georgia, 450 U.S. 261 (1981). The decision of the Wisconsin court clearly establishes separate and unequal classifications of litigants, without any apparent rational basis. Such an unconstitutional holding must not be allowed to stand.

Respectfully submitted this 31st day of October, 1990.

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PETITIONERS' APPENDIX

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Ricky F. Rineck, Individually, as surviving husband of Joy E. Rineck, and as guardian for Rachel J. Rineck, a minor, Plaintiff-Respondent-Cross Appellant-Petitioner,

v.

Leonard C. JOHNSON, CRNA, Luther Hospital, St. Paul Fire & Marine Insurance Company, and Wisconsin Patients Compensation Fund, Defendants-Appellants-Cross Respondents,*

BLUE CROSS & BLUE SHIELD UNITED OF WISCONSIN, Defendant.

Supreme Court

No. 88-1555. Argued March 27, 1990.—Decided June 14, 1990.

REVIEW of a decision of the Court of Appeals affirming in part and reversing in part a judgment of the Circuit Court for Chippewa County, Judge Richard Stafford. Affirmed in part, reversed in part, and remanded to the trial court for further proceedings.

For the plaintiff-respondent-cross appellant-petitioner there were briefs by Howard S. Marker, Minneapolis, Minnesota, and oral argument by Howard S. Marker.

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* Motion for reconsideration filed.

For the defendants-appellants-cross respondents there was a brief by Timothy J. Strattner and Schellinger & Doyle, S.C., Brookfield and oral argument by Mr. Strattner.

WILLIAM A. BABLITCH, J. Ricky F. Rineck (Rineck) seeks review of a court of appeals' decision, Rineck v. Johnson, 150 Wis. 2d 232, 440 N.W.2d 830 (Ct. App. 1989). The issues presented are: (1) whether in a medical malpractice action involving death, the plaintiff's recovery for loss of society and companionship is limited to $50,000 by the general provisions of the wrongful death statute, sec. 895.04(4), Stats; (2) whether a minor child has a separate cause of action for loss of society and companionship when medical malpractice causes the death of one parent and the decedent is survived by his or her spouse; and (3) whether the loss of the decedent's child care services are recoverable by the surviving spouse beyond the child's age of majority.

We conclude that in a medical malpractice action involving death, the $1,000,000 limitation on recovery for total noneconomic damages imposed by the specific statutes applicable to malpractice actions supersedes the $50,000 limitation contained in the wrongful death statutes. We further conclude that a surviving minor child has a cause of action for loss of society and companionship. Finally we conclude that the surviving spouse may not recover damages for post-majority loss of the decedent's child care services. The decision of the court of appeals is affirmed in part, reversed in part, and remanded to the trial court for further proceedings.

The facts for the purposes of this review are undisputed. Joy Rineck was admitted to the hospital for an emergency cesarean section. During that operation, a nurse anesthetist negligently failed to supply Joy with an adequate supply of oxygen. Consequently, Joy lapsed into a coma and died seven days later. The child who was delivered via the cesarean, Rachel, survived but purportedly is profoundly retarded and has cerebral palsy. The medical experts agree that Rachel's condition will not significantly improve. Unable to care for Rachel in his home by himself while employed full-time, Rineck found it necessary to move Rachel to his parents' home, where she is cared for by her grandmother.

In April, 1986, Rineck filed a Submission in Controversy pursuant to ch. 655, Stats., to pursue medical malpractice claims for damages sustained by himself and Rachel as a result of Joy Rineck's injuries and death, and as a result of Rachel's own injuries. That action was transferred without a hearing to circuit court when the legislature changed the procedure for prosecuting medical malpractice claims later that year. Rineck filed an amended complaint alleging a negligence action on his own behalf and a negligence action on behalf of Rachel for her personal injuries. Rineck claimed, among other things, damages for loss of his wife's society and companionship, for his loss of his wife's help in caring for Rachel, and for Rachel's loss of her mother's society and companionship. By agreement of the parties, claims relating to Joy's injuries and death, and those relating to Rachel's injuries, were bifurcated and the claims involving Joy were set for trial. The present action does not involve those claims relating to Rachel's injuries.

The defendants filed several pretrial motions: (1) to limit Rineck's claim for loss of his wife's society and companionship to $50,000 pursuant to sec. 895.04(4), Stats; (2) to exclude the claim for Rachel's loss of her mother's society and companionship; and (3) to deny that part of Rineck's claim for the loss of his wife's child care services that relate to the period beyond Rachel's eighteenth birthday.

The trial court denied the motion to impose a $50,000 limit on Rineck's claim for loss of society and companionship. The court held that the general wrongful death limitation under sec. 895.04(4), Stats, was superseded in medical malpractice actions involving death by the specific $1,000,000 limitation contained in sec. 893.55(4)(d), which is referenced by the medical malpractice statutes.

However, the trial court granted the defendants' motion to preclude Rachel's claims for loss of her mother's society and companionship. The trial court took under advisement the motion to exclude any damages for post-majority child care services that her mother would have provided for Rachel.

The jury awarded $408,987 in pecuniary damages, including $30,000 representing the post-majority cost of child care services. The jury also awarded $250,000 for loss of society and companionship. The trial court upheld the award of $250,000 for Rineck's loss of his wife's society and companionship. However, pursuant to its earlier ruling, the trial court determined that the amount representing loss of child care services should be eliminated from the damage award. The defendants appealed

that portion of the trial court's judgment which refused to limit Rineck's loss of society and companionship to $50,000. Rineck cross-appealed from that portion of the trial court's judgment which excluded Rachel's claim for the loss of her mother's society and companionship, and that portion of the decision eliminating the $30,000 jury award for post-majority child care.

The court of appeals reversed the trial court's decision on the noneconomic loss limit and held that the $50,000 limit under the wrongful death statute applied to Rineck's loss of society and companionship claim. However, the court of appeals affirmed the trial court's decision on the remaining two issues raised on the cross-appeal. The court concluded that the wrongful death statutes prohibited a surviving child from maintaining a claim for loss of society and companionship when the surviving spouse asserts such a claim, and that child care costs were limited to the child's majority.

We accepted review on August 15, 1989. The issues presented involve the interpretation of statutes, which are questions of law that we review independently of the lower courts' decisions. *DeMars v. LaPour*, 123 Wis. 2d 366, 370, 366 N.W.2d 891 (1985).

We conclude that in a medical malpractice action involving death, the $1,000,000 limitation recovery for total noneconomic damages under the specific statutes applicable to medical malpractice actions supersedes the $50,000 limit under sec. 895.04(4), Stats. We further conclude that a minor child may maintain an independent cause of action for loss of society and companionship when medical malpractice caused the death of a parent. Finally,

we conclude that the surviving spouse may not recover damages for post-majority loss of child care services.

I. Noneconomic damages limitations

We turn first to the issue whether the $50,000 wrongful death limitation on damages for loss of society and companionship contained in the general provisions under sec. 895.04(4), Stats, is applicable to an action for medical malpractice involving death under ch. 655. We hold that it is not.

Chapter 655, Stats, enacted by ch. 37, Laws of 1975, established an exclusive procedure for the prosecution of malpractice claims against a health care provider, as defined by sec. 655.001(8). *State ex. rel. Strykowski v. Wilkie,* 81 Wis. 2d 491, 499, 261 N.W.2d 434 (1978). Chapter 655 sets tort claims produced by medical malpractice apart from other tort claims, and parties are conclusively presumed to be bound by the provisions of the chapter regardless of injury or death. See secs. 655.005, 655.007.

Like the Worker's Compensation Act, ch. 655, Stats., is a legislative response to specific economic and social needs, and it applies to a limited class of persons. Both laws modify general civil law in instances where the statutes speak to a given subject. Id.; see also Stappas v. Kagen, 109 Wis. 2d 528, 530, 326 N.W.2d 757 (1982).

Chapter 655, Stats., expressly delineates the damages limitation imposed in medical malpractice actions. Under sec. 655.017, "[t]he amount of noneconomic damages recoverable by a claimant or plaintiff under this chapter for acts or omissions of a health care provider . . .

is subjected to the limit under s. 893.55(4)." Section 893.55(4)(b) provides:

> The total noneconomic damages recoverable under ch. 655 for bodily injury or death, including any action or proceeding based on contribution or indemnification, may not exceed the limit under par. (d) for each occurrence from all health care providers and all employees of health care providers acting within the scope of their employment and providing health care services who are found negligent and from the patients compensation fund for any action filed on or after June 14, 1986 and before January 1, 1991. (Emphasis added.)

The limitation contained in par. (d) referenced above provides:

> The limit on total noneconomic damages for each occurrence under par. (b) shall be $1,000,000 for actions filed on or after June 14, 1986 . . ..

The medical malpractice statutes also identify in sec. 893.55(5), Stats, several types of noneconomic loss recoverable in medical malpractice actions involving injury or death. One component of total noneconomic damages listed is the loss of society and companionship.

The defendants acknowledge that the total amount of noneconomic damages recoverable under the medical malpractice statutes is limited to $1,000,000. However, they argue that the component represented by society and companionship is itself limited to $50,000 by the wrongful death statute, sec. 895.04(4), Stats. We disagree.

Significantly, ch. 655, Stats., does not state that damages recoverable in medical malpractice cases are also subject to the $50,000 limitation under the general wrongful death provisions of sec. 895.04(4). Had the legislature desired to appropriate the more restrictive damage limits of sec. 895.04(4) it would have provided so explicitly as it did in other instances. Chapter 655 incorporates by specific reference certain other statutes which the legislature intended to apply in medical malpractice actions. For instance, the comparative fault statute, sec. 895.045, is specifically incorporated into ch. 655 by sec. 893.55(4)(c). Section 655.27(5)(d) provides that no interest may be paid by the fund on the unpaid portion of any claim filed under the paragraph except as provided under secs. 807.01(4), 814.04(4), or 815.05(8). Moreover, prior to the repeal of the panel procedure, the Rules of Civil Procedure were specifically incorporated by sec. 655.17(1). We do not believe that the legislature would have taken pains to specifically refer to particular statutes such as these if it intended to incorporate without mention other miscellaneous general provisions, such as sec. 895.04(4).

It is also significant to note that grafting the general wrongful death damages limitation under sec. 895.04(4), Stats, onto ch. 655 creates an anomaly in the computation of damages where comparative fault is a factor. As the trial court correctly observed, both statutes require a reduction for comparative fault pursuant to sec. 895.045. However, they do so in completely different ways. For example, to calculate the award in a medical malpractice action, the total noneconomic damages are found without regard to the $1,000,000 limit. Where appli-

cable, the comparison found under sec. 895.045 is applied, and then the result, if higher than the limit, is reduced to the limit. See sec. 893.55(4)(c). This approach is directly contrary to the current calculation used in the wrongful death statute. See sec. 895.04(7). Under sec. 895.04(7), reduction of noneconomic damages to the statutory limit precedes reduction for comparative fault. See also D. Saichek, *A Summary of the New Statutes Governing Medical Malpractice*, Wisconsin Bar Bulletin 8, 10 (October 1986).

The verdict reduction provisions of the wrongful death and medical malpractice statutes would therefore produce different damage awards even if the damage limits were the same. To illustrate, assume both statutes imposed a $50,000 limit in a case where the jury awards $250,000 for loss of society and companionship and the victim is assessed 20 percent fault. After reduction under the wrongful death statute, that award would be $40,000 ($250,000 first reduced to $50,000 by application of the limit, then reduced by the plaintiff's comparative fault.) However, under the medical malpractice version, the same award nets $50,000 ($250,000 reduced to $200,000 for the plaintiff's comparative fault, then reduced to the lesser of that amount or the limit).

Grafting the wrongful death statute's verdict reduction procedure onto ch. 655, Stats., would also create different substantive rights in cases involving injury and those involving death, contrary to the express legislative intention to treat medical malpractice claims involving "injury or death" in exactly the same manner. See secs. 655.005, 655.007. For example, the $1,000,000 limitation on total noneconomic damages would apply if the plaintiff

was injured by medical malpractice, but the $50,000 limitation of the wrongful death statute would apply if the injuries resulted in death.

Accordingly, we conclude that the $50,000 limitation under the general wrongful death provisions of sec. 895.04(4), Stats, is inapplicable to this action involving medical malpractice. The trial court correctly determined that the limitation established by sec. 895.04(4) was superseded in medical malpractice actions by virtue of the $1,000,000 limitation in sec. 893.55(4). The decision of the court of appeals is therefore reversed, and the jury's award for loss of spousal society and companionship is reinstated.

II. Rachel's loss of society and companionship

The second issue preserted involves whether a minor child has a separate cause of action for loss of society and companionship when medical malpractice causes the death of one parent and the decedent is survived by his or her spouse. AS an element of common law, the doctrine permitting recovery for loss of society and companionship was initially created and developed by courts of law. *Shockley v. Prier*, 66 Wis. 2d 394, 401, 225 N.W.2d 495 (1975). Thus, this is an area where either this court or the legislature may act. Id.

In *Moran v. Quality Aluminum Casting Co.*, 34 Wis. 2d 542, 150 N.W.2d 137 (1967), we declared for the first time that a woman could maintain an actio for the loss of her husband's consortium. We stated at 551-52:

> The genius of the common law is its ability to adapt itself to the changing needs of society. Because the bases on which the old common-law rule which denied to the wife the right of recovery for loss of her husband's consortium rest on historical concepts which long ago disappeared, we deem the rule of Nickel v. Hardware Mut. Casualty Co. should be overruled . . ..

In *Shockley*, 66 Wis. 2d at 401, we concluded for the first time that "the law should recognize the right of parents to recover for loss of aid, comfort, society and companionship of a child during minority when such loss is caused by the negligence of another." The *Shockley* decision focused upon the changes in the family relationship which occurred since 1925, when the court found that parents could recover only for the loss of the minor's earning capacity and reasonable medical and nursing expenses during minority. *Id.* at 396-97 (citing *Callies v. Reliance Laundry Co.*, 188 Wis. 376, 380, 206 N.W. 198 (1925)). In rejecting the argument that if such a change is to be made, it should be made by the legislature and not the courts, we reiterated that the common law is a developing body of law and that it is as much the court's responsibility as the legislature's to make changes in the law where the common law rule no longer fits present-day social realities. *Shockley* at 397-99.

In *Theama v. City of Kenosha*, 117 Wis. 2d 508, 527, 344 N.W.2d 513 (1984), we were faced with the reverse situation of that found in *Shockley*, namely whether the minor children of an injured parent could maintain an

action for loss of society and companionship. We stated that it was "only logical that the next step in this progression is to protect the child's interest in the parent-child relationship." *Theama*, 117 Wis. 2d at 519. We recognized that the majority of jurisdictions addressing the issue refused to recognize the cause of action. However, we noted an emerging trend towards recognition, and were persuaded by the rationale found in those decisions. Id. at 520. Accordingly, we did not await legislative creation of a cause of action, but rather held that a "child may bring a cause of action for the loss of a parent's society and companionship resulting from another's negligence." Id. at 527.

The defendants argue that *Theama* is distinguishable on the grounds that the case involved an injury to the parent, rather than death as in the present case. When death results, the defendants insist that the provisions of sec. 895.04(2), Stats., disallow a child an independent cause of action when the deceased parent is survived by his or her spouse. In support of their argument, the defendants cite *Hanson v. Valdivia*, 51 Wis. 2d 466, 475, 187 N.W.2d 151 (1971), where in applying sec. 895.04(2), this court stated:

> [S]urviving children do not have a cause of action for the wrongful death of one of their parents when the decedent is survived by his or her spouse .... When there is a surviving spouse the action must be brought by or on behalf of that spouse, and the only special protection afforded the children is that the court may, in its discretion, impose a lien in favor of the children on the amount recovered, not in excess of 50 percent of the recovery.

We disagree that sec. 895.04(2), Stats, prevents recovery in the case presently before us. Rachel's claim originates under ch. 655 rather than the general wrongful death statutes. Chapter 655 controls all claims "for injury or death on account of medical malpractice . . .." Section 655.007. As stated previously, by singling out medical malpractice claims in such a manner, the legislature intended to set medical malpractice cases involving death apart from other death cases to which the general wrongful death statute applies. Therefore, sec. 895.04(2) does not prevent a minor child from maintaining a cause of action for loss of society and companionship when medical malpractice causes the death of a parent.

We thus conclude that the reasons expressed in *Theama* for recognizing a minor child's cause of action for loss of society and companionship in cases involving injury to the parent apply with equal force to cases where medical malpractice causes death. Chapter 655, Stats., recognizes that there is no logical distinction between injury and death claims arising out of medical malpractice. Once medical malpractice produces a loss, a remedy exists regardless whether the consequence is injury or death. We further conclude consistent with *Theama*, the recovery under this cause of action is limited to the child's minority, since the minor is the one whose relationship is most likely

to be severely affected by negligent injury or death to the parent. Id. at 527.[1]

Because the trial court precluded Rachel's claim for loss of her mother's society and companionship, and the court of appeals affirmed that determination, the matter is remanded to the trial court for further proceedings on this issue.

III. Post-majority loss of child care services.

The third issue involves whether Rineck is entitled to compensation for the loss of his wife's child care services beyond the child's eighteenth birthday. Rineck argues that Rachel, who has allegedly suffered severe and permanent injuries, will require support and maintenance well beyond her minority. Therefore, Rineck insists that he should be able to recover the value of these services his wife would have provided.

We agree with the court of appeals that the amount the jury awarded Rineck for child care services after Rachel reached age eighteen is not recoverable. We recently stated in *Marciniak v. Lundborg*, 153 Wis. 2d 59, 71, 450 N.W.2d 243 (1990), that the parental duty of support ordinarily ceases at the age of majority. This rule involves a recognition that parents are obligated by law to provide

---

[1]In light of the fact that Rachel's claim for her injuries was bifurcated, and for the aid of the trial courts, we declare for reasons identical to those expressed in *Moran*, 34 Wis. 2d at 558, and *Shockley*, 66 Wis. 2d at 404, that a child's cause of action for loss of society and companionship must be joined with that of the injured parent, if feasible, and the claimant has the burden to establish that it was infeasible for his or her claim to be joined. By so requiring, the possibility of double recovery can be guarded against by the form of special verdict and the accompanying instructions to the jury in cases tried to a jury. See *Moran*, at 558; *see also Huggins by Huggins v. Sea Ins. Co., Ltd.*, 710 F. Supp. 243 (E.D. Wis. 1989.)

care only through their child's minority. See sec. 49.90(1)(a), Stats. In addition, this rule provides parity with the aforementioned rationale of *Theama*, which limits a child's loss of society and companionship to the period of minority. We recognize that in certain instances this result may seem harsh. However, we consider the decision as to any change in the limitation on recovery for the support of a child to be a public policy matter uniquely within the province of the legislature. *See Steinbarth v. Johannes*, 144 Wis. 2d 159, 164, 423 N.W.2d 540, 541 (1988).

We emphasize, however, as did the court of appeals, that this is an action brought by the surviving spouse for the death of his wife. The claims relating to Rachel's injuries were bifurcated and therefore we are not reviewing damages awarded to Rachel in her own right for injuries she received as a result of the medical malpractice. Accordingly, nothing in this decision precludes Rachel from recovering damages for the special care she may need beyond the age of majority in her own action based on the defendant's negligence.

By the Court.—The decision of the court of appeals is affirmed in part, reversed in part, and remanded to the trial court for further proceedings.

SUPREME COURT
OF WISCONSIN
P.O. BOX 1688
MADISON, WI 53701-1688

TELEPHONE (608) 266-1880

MARILYN L. GRAVES
CLERK

SEPTEMBER 13, 1990

TO: HOWARD S. MARKER

JAMES G. DOYLE

TIMOTHY J. STRATTNER

THE COURT TODAY ANNOUNCED AN ORDER IN YOUR CASE AS FOLLOWS:

DISTRICT 3
RINECK, R. v. JOHNSON, L., 88-1555

MOTION FOR RECONSIDERATION DENIED,
WITH $50.00 COSTS.
J. ABRAHAMSON DISSENTS—MEMO FILED.

MARILYN L. GRAVES
CLERK OF SUPREME COURT

No. 88-1555

RICKY F. RINECK et al.,

Plaintiff-Respondent-Cross Appellant-Petitioner,

v.

LEONARD C. JOHNSON et al.,

Defendants-Appellants-Cross Respondents.

Shirley S. Abrahamson, J. (dissenting). I would grant defendants-appellants-cross respondents' motion for reconsideration on the issue of whether the court's interpretation of secs. 893.55(4) and 895.04(4), Stats., violated the equal protection clauses of the Wisconsin and federal constitutions. The motion asserts that the court's interpretation of the law unconstitutionally divides tort victims in wrongful death actions into two classes: victims of health care providers and victims of all other tortfeasors. This issue was not argued by the parties or considered by the court. The issue is one that will be raised in future cases.

In the interest of judicial economy, I believe this court ought to decide this issue now for the benefit of litigants, lawyers, circuit courts and the court of appeals. I would grant the motion, require the parties to brief and argue this significant constitutional issue, and give the attorney general an opportunity to file a brief on the constitutional issue.

SUPREME COURT
OF WISCONSIN
P.O. BOX 1688
MADISON, WI 53701-1688

REMITTITUR

RICKY F. RINECK, INDIV., AS SURVIVING HUSBAND OF J E. RINECK, AND AS GDN. FOR RACHEL J. RINECK, A MIN
PLAINTIFF-RESPONDENT-CROSS-APPELLANT-PETITIONER,

V.

LEONARD C. JOHNSON, CRNA
LUTHER HOSPITAL,
ST. PAUL FIRE & MARINE INSURANCE CO.,
AND WISCONSIN PATIENTS COMPENSATION FUND,
DEFENDANTS-APPELLANTS-CROSS RESPONDENTS,
BLUE CROSS & BLUE SHIELD UNITED OF WISCONSIN,
DEFENDANT.

APPEAL NO. 88-1555
CIRCT.Ct. NO. 86 CV 378

THIS CAUSE WAS A REVIEW OF THE ORDER/DECISION OF THE COURT OF APPEALS. ON CONSIDERATION WHEREOF, IT IS NOW HERE ORDERED AND ADJUDGED BY THIS COURT IN AN OPINION FILED ON JUNE 14, 1990, THAT:

The decision of the Court of Appeals is affirmed in part, reversed in part, and remanded to the trial court for further proceedings.

WILLIAM A. BABLITCH Wrote Decision/ Opinion 016 PAGES

THE APPEAL RECORD IS HEREBY RETURNED TO CLERK OF CIRCUIT COURT FOR CHIPPEWA COUNTY.

I CERTIFY THAT THE ABOVE IS A CORRECT

TRANSCRIPT OF THE ORIGINAL ORDER AND JUDGMENT OF THE COURT IN THE ABOVE-ENTITLED CAUSE.

DATED:
SEPTEMBER 13, 1990.

/S/MLG

MARILYN L. GRAVES

CLERK, SUPREME COURT

SUPREME COURT OF WISCONSIN

RICKY F. RINECK, Individually, as Surviving Husband of JOY E. RINECK, and as Guardian for RACHEL J. RINECK, a Minor,

Plaintiff-Respondent-
Cross Appellant-Petitioner,

vs. Case No. 88-1555

LEONARD C. JOHNSON, CRNA, LUTHER HOSPITAL, ST. PAUL FIRE & MARINE INSURANCE COMPANY and WISCONSIN PATIENTS COMPENSATION FUND,

Defendants-Appellants-
Cross Respondents,

and

BLUE CROSS BLUE SHIELD UNITED OF WISCONSIN,

Defendant.

MOTION FOR RECONSIDERATION

The defendants-appellants-cross-respondents, Leonard C. Johnson, CRNA, Luther Hospital, St. Paul Fire & Marine Insurance Company, and the Wisconsin Compensation Fund, move the court, pursuant to secs.

809.64 and 809.14, Wis. Stats., for reconsideration of the supreme court's decision filed on June 14, 1990, on the grounds that the court's application of secs. 893.55(4) and 895.04(4), Wis. Stats., violates the equal protection clauses of the Wisconsin and United States Constitutions. The attached memorandum is made in support of this motion.

Dated at Brookfield, Wisconsin, this 3rd day of July, 1990.

SCHELLINGER & DOYLE, S.C.
Attorneys for Defendants-Appellants-
Cross Respondents

By: *s/s Timothy J. Strattner*
Timothy J. Strattner
Linda Vogt Meagher

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SUPREME COURT OF WISCONSIN

RICKY F. RINECK, Individually, as Surviving Husband of JOY E. RINECK, and as Guardian for RACHEL J. RINECK, a Minor,

Plaintiff-Respondent-
Cross Appellant-Petitioner,

vs. Case No. 88-1555

LEONARD C. JOHNSON, CRNA, LUTHER HOSPITAL, ST. PAUL FIRE & MARINE INSURANCE COMPANY and WISCONSIN PATIENTS COMPENSATION FUND,

Defendants-Appellants-
Cross Respondents,

and

BLUE CROSS BLUE SHIELD UNITED OF WISCONSIN,

Defendant.

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

On June 14, 1990, the Wisconsin Supreme Court filed its opinion in the above-captioned case. In its opinion, the supreme court held *inter alia* that when there is a claim for loss of society and companionship in a

medical malpractice/wrongful death case, the medical malpractice statutory cap for noneconomic damages, sec. 893.55(4), Wis. Stats. [$1,000,000.00], supersedes the wrongful death statutory cap for loss of society and companionship, sec. 895.04(4), Wis. Stats. [$50,000.00]. *Rineck v. Johnson*, slip opinion at 10. the supreme court also held that the surviving children of a person who dies as a result of medical malpractice may recover damages for loss of society and companionship, even though there is a surviving spouse. *Id.* at 14.

The court's interpretation of secs. 893.55(4) and 895.04(4), Wis. Stats., violates the equal protection clause of both the Wisconsin and United States Constitutions. Under the court's decision, a spouse or child of a person who died as the result of a negligent tortfeasor may only recover $50,000.00 for loss of society and companionship, whereas, a spouse or child of a person who dies as the result of negligence on the part of a "health care provider" may recover up to $1,000,000.00 for loss of society and companionship. *See* sec. 655.001(8), Wis. Stats., for the definition of health care provider. Moreover, under the court's interpretation, a surviving child of a person who dies as a result of a health care provider's negligence, in a wrongful death action, may recover damages for loss of society and companionship even if there is a surviving spouse. In contrast, in nonmedical malpractice/wrongful death actions, the surviving children of a person who dies as a result of a tortfeasor's negligence may not recover such damages if there is a surviving spouse. *Hanson v. Valdivia*, 51 Wis. 2d 466, 187 N.W.2d 151 (1971).

In other words, the court's interpretation of the law divides tort victims in wrongful death actions into two classes: victims of health care providers and victims of all other tortfeasors. Since there is no rational basis for the resulting inequities, this interpretation of the law violates the equal protection clauses of the Wisconsin and United States Constitutions. *See* U.S. Const. amend. XIV; Wis. Const. amend. Art. I, Sec. 1.

Facts

The plaintiff-respondent-cross-appellant-petitioner, Ricky F. Rineck (plaintiff), commenced this action against the defendant-appellant-cross-respondent, Leonard C. Johnson, CRNA, and Luther Hospital (defendants), alleging that the defendants had been negligent in their treatment of Ricky Rineck's wife, Joy E. Rineck. (R. 1). Both defendants are health care providers under chapter 655, Wis. Stats. *See* sec. 655.001(8), Wis. Stats.

Before trial, the defendants filed a Motion in Limine to limit damages for loss of society and companionship to $50,000.00. *See* sec. 895.04(4), Wis. Stats. However, the trial court ruled that the medical malpractice statutory cap for noneconomic damages controlled and that the plaintiff was entitled to up to $1,000,000.00 for noneconomic damages, including loss of society and companionship. (R. 21). *See* sec. 893.55(4), Wis. Stats. The trial court also held that only the surviving spouse was entitled to damages for loss of society and companionship. The case was tried to a jury, which awarded damages for loss of society and companionship to Randy Rineck in the amount of $250,000.00. (R. 42). In Motions After Verdict, the defendants attempted to reduce the award to $50,000.00,

but the trial court ordered judgment on that portion of the verdict. (R. 45).

The defendants then appealed the case to the court of appeals. The plaintiff filed a cross-appeal. The Wisconsin Court of appeals held that the medical malpractice statute limiting recovery of total noneconomic damages to $1,000,000.00 does not abolish the $50,000.00 limitation in wrongful death actions for loss of society and companionship, and that the latter limitation applies where death results from medical malpractice. *Rineck v. Johnson*, 440 N.W.2d 830, 832 (Ct. App. 1989). The court of appeals also affirmed the trial court's decision to limit the recovery for loss of society and companionship to the surviving spouse. *Id.* at 833.

The court of appeals decision was reversed in part and affirmed in part by the supreme court. The supreme court held *inter alia* that the $50,000.00 limit on damages for loss of society and companionship in wrongful death actions, *see* sec. 895.04, Wis. Stats., was abolished by sec. 893.55(4), Wis. Stats., in wrongful death/medical malpractice actions. Therefore, in a wrongful death/medical malpractice action, the plaintiffs could recover up to $1,000,000.00 for such damages. *Rineck*, slip opinion at 10. Furthermore, the supreme court held that surviving children, as well as the surviving spouse, were entitled to damages for loss of society and companionship in wrongful death/medical malpractice actions. *See id.* at 13-14.

Argument

The fourteenth amendment to the United States Constitution providers *inter alia* that: "No state shall

. . . deny to any person within its jurisdiction the equal protection of the laws." Article I, section 1 of the Wisconsin Constitution states that "[a]ll people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed."

The protection afforded by the equal protection provision of the Wisconsin Constitution is substantially equivalent to the due process and equal protection clauses of the fourteenth amendment to the United States Constitution. *Yotvat v. Roth*, 95 Wis. 2d 357, 363 n. 1, 290 N.W.2d 524 (Ct. App. 1980). Thus, federal case law may be utilized to interpret both equal protection clauses.

The equal protection clause of the fourteenth amendment requires equal protection and security for all under like circumstances. *See In re Seraphim*, 97 Wis. 2d 485, 496, 294 N.W.2d 485 (1980), *cert. denied*, 449 U.S. 994 (1980). The initial inquiry in an equal protection analysis is the level of scrutiny to be applied to the statutory classification under attack.

Traditionally, two standards have been applied when a statute, or its application, is challenged on equal protection grounds. The strict scrutiny test is applied when the case involves a suspect classification, *i.e.*, race, *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964); ancestry, *Oyama v. California*, 332 U.S. 633, 644-46 (1948); and alienage, *Graham v. Richardson*, 403 U.S. 365, 372 (1971); *or* the classification infringes on a fundamental right, *i.e.*, privacy, *Roe v. Wade*, 410 U.S. 113, 154-64 (1973); marriage, *Zablocki v. Redhail*, 434 U.S. 374, 383-87 (1978); voting, *Bullock v. Carter*,

405 U.S. 134, 144 (1972); travel, *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969); and freedom of association, *NAACP v. Alabama*, 357 U.S. 449, 460-62 (1958). *See Hoffmann v. United States*, 767 F.2d 1431 (9th Cir. 1985). To withstand scrutiny, under the strict scrutiny test, a statute must be precisely tailored to serve a compelling state interest. *Plyer v. Doe*, 457 U.S. 202, 217 (1982).

If the case does not involve a suspect classification or a fundamental right, the court will apply the rational basis standard. *See State ex. rel. Jones v Gerhardstein*, 141 Wis. 2d 710, 733, 416 N.W.2d 883 (1987). The rational basis standard is used to analyze economic or social legislation. Under the test, the challenged classification must rationally relate to a legitimate state interest. *See Rubin v. City of Wauwatosa*, 116 Wis. 2d 305, 319, 342 N.W.2d 451 (Ct. App. 1983).

Recently, the United States Supreme Court has begun to develop an intermediate level of scrutiny. Under this standard, a statutory classification is validated if it *substantially* furthers a proposed legislative purpose. *See Craig v. Boren*, 429 U.S. 190 (1976). The Supreme Court has utilized this standard only on gender based classifications and classifications based on legitimacy. *See Trimble v. Gordon*, 430 U.S. 762 (1977). *See also Marshfield Clinic v. Discher*, 105 Wis. 2d 506, 314 N.W.2d 326 (1982).

Since this case does not involve a suspect classification or a fundamental right, the strict scrutiny test does not apply. Also, the Wisconsin appellate courts have limited the use of the intermediate scrutiny test. Therefore, the rational basis standard applies to this case. *See State ex. rel Strykowski v. Wilkie*, 81 Wis. 2d 491, 261 N.W.2d 434

(1978). The rational basis test requires a "legitimate state interest" to rationalize a denial of equal protection. The application of equal protection standards require "some rational relationship to a legitimate purpose." *See Sahagian v. Dickey*, 646 F. Supp. 1502, 1510-11 (W.D. Wis. 1986); *Hartland - Richmond Town Ins. Co. v. Wudtke*, 145 Wis. 2d 682, 429 N.W.2d 496 (Ct. App. 1988). The challenged classification must rationally relate to a legitimate state interest; the basic test is not whether some inequality results from the classification, but whether there exists any reasonable basis to justify the classification. *See Rubin*, 116 Wis. 2d at 319. In order to determine whether there is a rational relationship between the classification and a legitimate state purpose, the history of the statute and intent of the legislature must be examined to establish the legislative purpose behind sec. 893.55(4), Wis. Stats.

1. The supreme court's holding that sec. 893.55(4) abolished the $50,000.00 wrongful death statute limitation on loss of society and companionship creates a classification that violates the equal protection clause.

Prior to the enactment of the statute in 1986, there was no limitation on noneconomic damages in medical malpractice actions. *See* 1985 Wis. Act 340. Wisconsin, like numerous states in the country, enacted a statutory cap on noneconomic damages as a legislative response to the medical malpractice insurance crisis. *See* Comment, *The Constitutionality of Wisconsin's Noneconomic Damage Limitation*, 72 Marq. L. Rev. 235 (1989).

> Between 1960 and 1970, insurance rates for physicians increased dramatically. Rates for non-surgical physicians increased an average of 540.8%, while the rates for surgical physicians increased an astounding 949.2%.

Id. at 235.

In *Fein v. Permanente Medical Group*, 211 Cal. Rptr. 368, 695 P.2d 665 (Cal. 1985), the California Supreme Court explained the intent of the California legislature in enacting a statute that limited noneconomic damages to $250,000.00 in medical malpractice cases:

> [I]n enacting [the statute] the Legislature was acting in a situation in which it had found that the rising costs of medical malpractice insurance was posing serious problems for the health care system in California, threatening to curtail the availability of medical care in some parts of the state and creating the very real possibility that many doctors would practice without insurance, leaving patients who might be injured by such doctors with the prospect of uncollectible judgments. In attempting to reduce the costs of medical malpractice insurance ..., the Legislature enacted a variety of provisions affecting doctors, insurance companies and malpractice plaintiffs.

Id. at 680. *See also Hoffmann*, 767 F.2d at 1434.

Clearly, by enacting sec. 893.55(4), Wis. Stats., the Wisconsin Legislature sought to deal with the medical malpractice crisis by limiting, and not expanding, the liability of "health care providers." Thus, the "legislative purpose" behind the statute was to limit the liability of

a health care provider to ameliorate the medical malpractice liability crisis. Also, the statute furthered the state interest in ensuring the availability and affordability of medical care. As the court of appeals noted in their decision in this case, the Wisconsin Legislature did not intend to expand the liability of health care providers or remove any previously imposed limits on damages recoverable in wrongful death actions. *Rineck*, 440 N.W.2d at 832.

It is undisputed that prior to the enactment of sec. 893.55(4), Wis. Stats., the wrongful death statutory limitation applied to medical malpractice/wrongful death cases. Under the supreme court's interpretation of sec. 893.55(4) and sec. 895.04(4), Wis. Stats., the statutory limitations set forth in the wrongful death statute for loss of society and companionship [$50,000.00], no longer apply to medical malpractice actions when a death is involved. Under the court's decision, the $1,000,000.00 limit on noneconomic damages now applies to a l elements of noneconomic damages in medical malpractice/wrongful death actions. Therefore, the wrongful death statute limit for loss of society and companionship damages has been abolished in medical malpractice/wrongful death cases. In other words, the court's application of sec. 893.55(4) in this case *expands* the liability of health care providers in medical malpractice actions. This application is in direct conflict with the intent behind the enactment of the noneconomic statutory cap enacted by the legislature, *i.e.*, to limit the liability of health care providers.

Since the supreme court's interpretation of sec. 893.55(4), Wis. Stats. in this case, expands the health

care provider's liability in wrongful death actions, there is no rational relationship between the classification caused by the court's interpretation and the legislative purpose behind the statute, *i.e.*, to ameliorate the crisis and the availability and cost of liability insurance by limiting the liability of health care providers. Instead, the court's interpretation of the statute is completely contrary to the legislative purpose and therefore, the classification created by this interpretation of the statute violates the equal protection clause.

The interpretation suggested by the supreme court divides tortfeasors in wrongful death actions into two classifications: health care provider tortfeasors and all other tortfeasors. It also divides victims in wrongful death cases into two categories: those injured by health care provider tortfeasors and those injured by all other tortfeasors. Since there is no rational relationship between these classifications and a legitimate state purpose, the classifications violate the equal protection clauses of the Wisconsin and United States Constitutions.

Under common law, there is no action for wrongful death. The cause of action for wrongful death is purely statutory. *Weiss v. Regent Properties, Ltd.*, 118 Wis. 2d 225, 346 N.W.2d 766 (1984). Therefore, without the wrongful death statute, the plaintiff would not have been able to bring his action against the defendants. Therefore, the wrongful death statute clearly applies to this case. A damage claim for loss of society and companionship is properly construed as merely one element of damages recoverable in a wrongful death action. *Jaeger v. Raymark Indus., Inc.*, 610 F. Supp. 784, 788 (E.E. Wis. 1985). The

legislature under 895.045(4), Wis. Stats., limited recovery for loss of society and companionship to $50,000.00.

The Wisconsin Supreme Court has now held that the $50,000.00 limitation in wrongful death actions does not apply to medical malpractice/wrongful death cases, thereby creating a classification that violates the equal protection clause of the Wisconsin and United States Constitution.

The Wisconsin Supreme Court's interpretation of the statute will cause extreme inequities in the future. For example, a spouse of a person who dies as a result of using a defectively manufactured automobile may only recover $50,000.00 for loss of society and companionship. In contrast, a spouse of a person who dies as a result of the negligence on the part of a nurse may recover $1,000,000.00 for loss of society and companionship. The Supreme Court's decision *has increased* the exposure faced by health care providers, not limited it. Clearly, there is no legislative purpose for such inequities.

The supreme court's application of the two statutes becomes even more complicated in cases involving both a health care provider/tortfeasor and a regular tortfeasor. The following example will demonstrate the complexities involved:

> A drug manufacturer distributes a defective drug that has been known to cause gastrointestinal bleeding and in some cases death. A physician prescribes the drug to Mr. X, although the prescription is not called for in Mr. X's case. Mr. X then dies as a result of an adverse reaction to the prescription. Mr. X's

spouse then brings a wrongful death action and asserts a claim for loss of society and companionship. The jury finds that the doctor was 1% negligent and the drug manufacturer was 99% negligent. The jury then awards Mr. X's $500,000.00 for loss of society and companionship.

Under the court's interpretation of the statute, the physician will pay the entire $500,000.00 [or $450,500.00 if the drug manufacturer pays 99% of the $50,000.00 statutory limitation in sec. 895.04(4), Wis. Stats.], since the drug manufacturer and the doctor are jointly and severally liable. Although the physician was only responsible for 1% of the plaintiff's injuries, under the court's interpretation, he or she will have to pay almost the entire amount of the loss of society and companionship award.

Thus, the court's interpretation of sec. 893.55(4), Wis. Stats., creates a classification which violates the equal protection clause of the United States and Wisconsin Constitutions, since there is no rational relationship between the classification and a legitimate state purpose.

2. The supreme court's holding that the surviving children, as well as the surviving spouse, may recover damages for loss of society and companionship in wrongful death/medical malpractice actions creates a classification that violates the equal protection clause.

Generally, a surviving child may not bring a cause of action for the wrongful death of his or her parent if there is a surviving spouse. *Hanson v. Valdivia*, 51 Wis. 2d 466, 475, 187 N.W.2d 151 (1971).

Surviving children do not have a cause of action for the wrongful death of one of their parents when the decedent is survived by his or her spouse. . .when there is a surviving spouse the action must be brought by or on behalf of that spouse. . ..

Id. at 475.

In its decision in this case, the Wisconsin Supreme Court conceded that in wrongful death actions generally such a rule exists. *Rineck*, slip opinion at 13. However, the court held that if a parent dies as the result of medical malpractice, the surviving children, as well as the surviving spouse, may bring a cause of action for loss of society and companionship. *Id.* The supreme court concluded that Rachel Rineck's claim originated in ch. 655 and not the general wrongful death statute. *Id.*

Therefore, the supreme court denied the plaintiff's attempt to expand *Theama v. City of Kenosha*, 117 Wis. 2d 508, 527, 344 N.W.2d 513 (1984), to apply to all wrongful death actions. *Id.* at 13. In *Theama*, the supreme court held that a minor child may bring an action for loss of society and companionship if his or her parent is injured by the negligence of another. *Theama*, 117 Wis. 2d at 519. The court limited its expansion of *Theama* only to the medical malpractice/wrongful death realm, since *Theama* already applied to actions that involve injury to a parent caused by medical malpractice.

The court's limited application of *Theama* in wrongful death/medical malpractice cases again creates classifications that violate the equal protection clauses of the Wisconsin and United States Constitution. In cases where there is a surviving spouse, victims in wrongful

death actions are divided into two classifications: (1) surviving children whose parent dies as the result of a negligent health care provider; and (2) surviving children whose parent dies as a result of negligence on the part of another tortfeasor. The supreme court's interpretation also divides tortfeasors into two categories: (1) negligent health care providers and (2) all other tortfeasors.

As discussed in the previous subsection, these classifications violate the equal protection clause because there is no rational relationship between the classifications and a legitimate state purpose. The legislature enacted sec. 893.55(4), Wis. Stats., as a means of limiting the liability of health care providers. Instead, the supreme court's decision, and its interpretation of sec. 893.55(4), expand health care liability. Prior to the enactment of the statute, and the court's decision in this case, only the surviving spouse was entitled to up to $50,000.00 for loss of society and companionship. *See* sec. 895.04, Wis. Stats. Now, surviving children, as well as the surviving spouse, may recover damages for loss of society and companionship in medical malpractice/wrongful death actions up to $1,000,000.00. *See* sec. 893.55(4), Wis. Stats.

As a result of the court's decision, the health care provider's liability exposure increased from $50,000.00 to $1,000,000.00. *See* secs. 893.55(4) and 895.04, Wis. Stats. Because there is no rational relationship between the classifications created by the supreme court's interpretation of sec. 893.55(4) and a legitimate state purpose, the classifications violate the equal protection clauses of the Wisconsin and United States Constitutions.

3. The statutory cap on noneconomic damages, as created by the Wisconsin legislature, is constitutional.

The statutory cap on noneconomic damages in medical malpractice actions, *see* sec. 893.55(4) Wis. Stats., itself creates two classes: persons injured by health care provider tortfeasors and persons injured by all other tortfeasors. It also divides victims into an additional classification: persons injured in medical malpractice actions with noneconomic damages of $1,000,000.00 or less, and persons injured in medical malpractice cases with noneconomic damages of more than $1,000,000.00. However, these classifications do not violate the equal protection clauses of the Wisconsin and United States Constitutions. There is a rational relationship between the classifications and the legitimate legislative purpose; *i.e.* to limit the liability of health care providers and to attempt to solve the medical malpractice crisis. *See State ex. rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 507-08, 261 N.W.2d 434 (1978). However, the court's interpretation of the statute in this case has created other classifications that do violate the equal protection clause of both the Wisconsin and United States Constitutions.

Conclusion

For the foregoing reasons, the defendants-appellants-cross-respondents respectfully request that this court grant their Motion for Reconsideration and affirm the court of appeal's decision.

Dated at Brookfield, Wisconsin this 3rd day of July, 1990.

SCHELLINGER & DOYLE, S.C.

Attorneys for Defendants-Appellants-Cross-Respondents

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Ricky F. RINECK, individually as surviving husband of Joy E. Rineck, and as guardian for Rachel J. Rineck, a minor, Plaintiffs-Respondents-Cross Appellants,

v.

Leonard C. JOHNSON, CRNA Luther Hospital, St. Paul Fire & Marine Insurance Co., and Wisconsin Patients Compensation Fund, Defendants-Appellants-Cross Respondents,

BLUE CROSS & BLUE SHIELD UNITED OF WISCONSIN, Defendant.

Court of Appeals

No. 88-1555. Submitted on briefs April 6, 1989. Decided April 25, 1989.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Chippewa county. RICHARD STAFFORD, Judge. *Affirmed in part, reversed in part, and cause remanded.*

For defendants-appellants-cross respondents there were briefs by *Timothy J. Strattner* and *Gregory W. Lyons* of *Schellinger & Doyle, S.C.*, of Brookfield.

For plaintiffs-respondents-cross appellants there were briefs by *Howard S. Marker* of *Howard S. Marker & Associates, P.A.*, of Minneapolis, Minnesota.

Before Cane, P.J., LaRocque and Myse, JJ.

MYSE, J. Leonard Johnson appeals a judgment awarding Ricky Rineck $250,000 damages for loss of his deceased spouse's society and companionship. Johnson argues that the trial court erred by refusing to limit the award to $50,000 pursuant to sec. 895.04(4), Stats. Rineck cross-appeals, contending that a child has a separate cause of action for loss of society and companionship when medical malpractice causes death of one parent, regardless of whether the deceased parent's spouse survives. He also argues that he is entitled to compensation for the loss of a deceased parent's child care services beyond the surviving child's eighteenth birthday when the child is disabled.

We conclude that sec. 895.04(4) limits recovery for loss of society and companionship in a wrongful death action to $50,000, notwithstanding sec. 893.55(4), Stats. We also conclude that a surviving child does not have a claim for loss of society and companionship when the surviving spouse asserts such a claim in a wrongful death action and that sec. 895.04(2) limits damages for child care to the costs of child care during the child's minority. Therefore, we affirm in part, reverse in part, and remand for entry of judgment in accordance with this opinion.

The following facts lead to this dispute. Upon being admitted to the hospital, Joy Rineck had an emergency cesarian section. During the operation, Johnson, the anesthetist, negligently failed to supply Joy with an adequate supply of oxygen. She lapsed into a coma and died seven days later. Although the child, Rachel, survived, she is profoundly retarded and has cerebral palsy. As a result, she will need special care for the rest of her life.

Rineck filed a wrongful death action on his behalf and a negligence action on behalf of Rachel for her personal injuries. The parties agreed to bifurcate the two claims, and the present appeal concerns only the wrongful death action. The jury awarded Rineck $408,987 in pecuniary damages[1] and $250,000 for loss of society and companionship.

The trial court reduced the amount of pecuniary damages because the amount the jury awarded for services Joy would have provided caring for Rachel after Rachel reached age eighteen was not recoverable. The court also refused to allow Rachel to assert a claim for loss of society and companionship as part of the wrongful death action because Ricky, the surviving spouse, asserted such a claim.

Johnson argues that pursuant to sec. 895.04(4), Rineck cannot recover more than $50,000 for loss of society and companionship. The issue is whether the limitation on the loss of society and companionship established by sec. 895.04(4) was removed in medical malpractice actions when the legislature adopted sec. 893.55(4). Because this involves the interpretation of statutes, it is a

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[1]This sum was broken down as follows:

a. Funeral and burial expense– $5,987.00 (answered by the Court)

b. Past and future loss of earnings which Joy E. Rineck would have contributed to the expenses of maintaining the family and the home– $200,000.00

c. Past and future loss of household services– (not including child care) $98,000.00

d. Past and Future loss of child care services by Joy E. Rineck to Rachel J. Rineck up to age 18– $75,000.00

e. Future loss of child care services by Joy E Rineck to Rachel J. Rineck after Rachel J. Rineck reaches her 18th birthday– $30,000.00

question of law that we review independently of the trial court's determination. *Brown v. Thomas*, 127 Wis. 2d 318, 323, 379 N.W.2d 868, 870 (Ct. App. 1985).

Section 895.04(4) provides:

> Judgment for damages for pecuniary injury from wrongful death may be awarded to any person entitled to bring a wrongful death action. Additional damages not to exceed $50,000 for loss of society and companionship may be awarded to the spouse, children or parents of the deceased.

Section 893.55(4)(b) provides:

The total noneconomic damages recoverable under ch. 655 for bodily injury or death, including any action or proceeding based on contribution or indemnification, may not exceed the limit under par. (d) for each occurrence from all health care providers and all employes of health care providers acting within the scope of their employment and providing health care services who are found negligent and from the patients compensation fund for any action filed on or after June 14, 1986 and before January 1, 1991.

The limitation contained in para. (d) referenced above provides:

> The limit on total noneconomic damages for each occurrence under par. (b) shall be $2,000,000 for actions filed on or after June 14, 1986. . ..

Paragraph (a) defines noneconomic damages as follows:

> In this subsection, "noneconomic damages" means moneys intended to compensate for pain and suffering, humiliation; embarrassment; worry; mental distress; noneconomic effects of disability including loss of enjoyment of the normal activities, benefits and pleasures of life and loss of mental or physical health, well-being or bodily functions; loss of consortium, society and companionship; or loss of love and affection.

In reading these statutes together, the trial court concluded that the language limiting the recovery of total noneconomic damages to $1,000,000 necessarily removed the $50,000 limitation for loss of society and companionship where death results from medical malpractice.

The language in sec. 893.55(4)(d) provides that the total noneconomic losses may not exceed $1,000,000 in the aggregate. This limitation is consistent with a specific limitation on one of the seven types of noneconomic loss identified by the statute. It would seem that the statute's clear and unambiguous language does not abolish the limitation on the amount that may be recovered for loss of society and companionship established by sec. 895.04(4).

The trial court, however, held that the two statutes created an ambiguity. Even if we assume an ambiguity exists and resort to examination of the legislative history, our conclusion remains unchanged.

When statutes are ambiguous, we must determine the legislative intent from the language in the statute in relation to its scope, history, context, subject matter, and object intended to be accomplished. *A. v. Racine*

County, 119 Wis. 2d 349, 352, 349 N.W.2d 743, 744 (Ct. App. 1984). We examine the legislative history to determine what effect, if any, the adoption of sec. 893.55(4) had on the previously adopted statute limiting recovery for loss of society and companionship to $50,000. The legislative history is silent as to whether the legislature intended sec. 893.55(4) to preempt sec. 895.04(4) in certain cases. Furthermore, sec. 893.55(4) was intended to limit, not expand, recovery of noneconomic damages in medical malpractice cases. We conclude that in adopting sec. 893.55(4), the legislature did not intend to remove any previously imposed limits on damages recoverable in a wrongful death action. We therefore hold that the provisions of sec. 893.55(4) limiting the total noneconomic damages to $1,000,000 have no effect on the sec. 895.04(4) limitation on the amount recoverable for loss of society and companionship. The trial court is directed to reduce the judgment to reflect the $50,000 limitation on recovery for loss of society and companionship.

On his cross-appeal, Rineck argues that the court erred by refusing to award $30,000 to compensate for the loss of Joy's child care services after Rachel reaches age eighteen. Rineck argues that Rachel, who has suffered severe and permanent injuries, will require support and maintenance well beyond her minority and that Rineck should be able to recover the value of these services in this action because Joy would have provided them.

We note initially that this is a wrongful death action brought by the surviving spouse for the death of his wife. We are not reviewing damages awarded to Rachel in her own right for injuries she received as a result

of Johnson's negligence. The right to recover damages for wrongful death is limited strictly to the parties designated by the legislature. *Weiss v. Regent Properties, Ltd.*, 118 Wis. 2d 225, 230-31, 346 N.W.2d 766, 768 (1984).

The wrongful death statute, sec. 895.04(2), provides that

> [i]f the deceased leaves surviving a spouse, and minor children under 18 years of age with whose support the deceased was legally charged, the court. . .in recognition of the duty and responsibility. . .to support minor children, shall determine the amount, if any, to be set aside for the protection of such children.. . .

See also Steinbarth v. Johannes, 144 Wis. 2d 159, 164, 423 N.W.2d 540, 541 (1988). This statute limits recovery in a wrongful death action to the child's minority.

The supreme court's decisions in *Shockley v. Prier*, 66 Wis. 2d 394, 255 N.W.2d 495 (1975), and *Theama v. City of Kenosha*, 117 Wis. 2d 508, 344 N.W.2d 513 (1984) support this result. A child's cause of action for loss of a parent's society and companionship in negligence actions is limited to the child's minority. *Theama*, 117 Wis. 2d at 527, 344 N.W.2d at 522. Although this result may seem unduly harsh, we note that the decision as to who may recover and the limits on the amount recoverable pursuant to the wrongful death statute are matters uniquely within the province of the legislature because they involve concerns of public policy. *See Steinbarth*, 144 Wis. 2d at 163-64, 423 N.W.2d at 541. If the limitation on recovery for the support of a child is to be expanded in a wrongful death action to include the services the decedent would have

provided after the child reaches majority, it is a matter for the legislature to address. Furthermore, Rachel is not precluded from recovering damages for the special care she will need beyond age eighteen in an action based on Johnson's negligence in causing her injuries. We conclude that the trial court correctly limited Rineck's recovery and excluded the recovery of sums for Rachel's support and maintenance after she reaches age eighteen.

Finally, Rineck argues that Rachel has her own claim for loss of her mother's society and companionship notwithstanding her father's claim as Joy's surviving spouse. This issue is controlled by *Hanson v. Valdivia*, 51 Wis. 2d 466, 187 N.W.2d 151 (1971). In applying sec. 895.04(2), the court stated:

> [S]urviving children do not have a cause of action for the wrongful death of one of their parents when the decedent is survived by his or her spouse, ... When there is a surviving spouse the action must be brought by or on behalf of that spouse, and the only special protection afforded the children is that the court may, in its discretion, impose a lien in favor of the children on the amount recovered, not in excess of 50 percent of the recovery.

Id. at 475, 187 N.W.2d at 156. Accordingly, we conclude that the trial court correctly denied Rineck's motion to seek damages on Rachel's behalf for the loss of society and companionship.

By the Court. — Judgment affirmed in part, reversed in part, and cause remanded.

STATE OF WISCONSIN CIRCUIT COURT CHIPPEWA COUNTY

RICKY F. RINECK, individually, as surviving husband of JOY E. RINECK, and as Guardian for RACHEL J. RINECK, a minor,

Plaintiffs,

JUDGMENT

vs.

Court File: 86 CV 378

LEONARD C. JOHNSON, CRNA; LUTHER HOSPITAL; ST. PAUL FIRE & MARINE INSURANCE CO.; BLUE CROSS & BLUE SHIELD UNITED OF WISCONSIN; and WISCONSIN PATIENTS COMPENSATION FUND,

Defendants.

After bifurcation, that portion of the above-entitled action relating to claims arising out of the death of Joy E. Rineck came on for trial on May 9, 1988; Howard S. Marker, Esq. and David Oskie, Esq., appearing for Plaintiff Ricky F. Rineck, individually as surviving husband of Joy E. Rineck; Misfeldt & Stark, S.C., by Thomas J. Misfeldt, Esq., appearing on behalf of Defendants Leonard C. Johnson, CRNA, Luther Hospital, St. Paul Fire & Marine Insurance Company and Wisconsin Patients Compensation Fund.

The case was tried before the Court and a jury and the jury verdict, which was rendered on May 13, 1988, is on file herein. The jury awarded Ricky F. Rineck $658,987.00 as damages resulting from the death of his wife, Joy E. Rineck, of which $408,987.00 was allocated for pecuniary loss and $250,000.00 was allocated for loss of society and companionship. On motion of defendants, on June 9, 1988 the Court reduced the award by the sum of $30,000.00, which amount represents the jury's award for plaintiff's loss of child care services Joy E. Rineck would have provided for Rachel J. Rineck after Rachel J. Rineck reaches the age of 18 years; and that same day, on motion of plaintiff, the Court ordered judgment on the jury verdict so reduced in favor of Ricky F. Rineck and against defendants in the amount of $628,987.00, together with costs and disbursements.

Defendant Leonard C. Johnson's last known address is Eau Claire, Wisconsin and he is a certified registered nurse anesthetist by profession; Defendant Luther Hospital's last known address is 1221 Whipple, Eau Claire, Wisconsin and it is in the business of providing medical and hospital care; Defendant Wisconsin Patients Compensation Fund is a Wisconsin corporation and Defendant St. Paul Fire & Marine Insurance Company is a Minnesota Corporation, both in the business of providing insurance for Wisconsin health care providers.

NOW THEREFORE, on motion of Howard S. Marker, Esq., attorney for plaintiff;

IT IS ADJUDGED, that the jury award is reduced by the sum of $30,000.00 and that Plaintiff, Ricky

F. Rineck, shall recover from the Defendants, Leonard C. Johnson, CRNA, Luther Hospital, St. Paul Fire & Marine Insurance Company and Wisconsin Patients Compensation Fund, the sum of Six Hundred Twenty-Eight Thousand, Nine Hundred Eighty-Seven and No/100 ($628,987.00) Dollars, of which $378,987.00 is pecuniary loss and $250,000.00 is loss of society and companionship, together with interest from the date of verdict, his costs and disbursements herein. Out of such amount Plaintiff, Ricky F. Rineck, shall withhold the sum of $75,000.00 and, after deducting attorney's fees and costs from that sum on a pro rata basis, shall deposit the remainder thereof in a separate account, to be held in trust by him pending the disposition of the suit which remains on behalf of Rachel J. Rineck, or until further order of this Court.

Dated this 8th day of July, 1988.

BY THE COURT

/s/ Richard H. Stafford

Richard H. Stafford

Circuit Court Judge

STATE OF WISCONSINCIRCUIT COURTCHIPPEWA COUNTY
BRANCH II

RICKY F. RINECK, et al.,

Plaintiffs,

vs. MEMORANDUM OPINION

LEONARD C. JOHNSON, CRNA: LUTHER HOSPITAL: ST. PAUL FIRE & MARINE INSURANCE CO.: BLUE CROSS & BLUE SHIELD UNITED OF WISCONSIN: and WISCONSIN PATIENTS COMPENSATION FUND,

Defendants.

The sole issue presented by defendant's motion is whether or not the $50,000.00 limitation for loss of society and companionship contained in Wisconsin's wrongful death statute applies to a claim made in a medical malpractice action under Chapter 655.

Sec. 895.04(4) of Wisconsin's wrongful death statute reads:

> "Judgment for damages for pecuniary injury from wrongful death may be awarded to any person entitled to bring a wrongful death action. Additional damages not to exceed $50,000.00 for loss of society and companionship may be awarded to the spouse, children, or parents of the deceased."

Sec. 655.017 states:

"The amount of noneconomic damages recoverable by a claimant or plaintiff under this chapter for acts or omissions of a health care provider. . .is subject to the limit under s. 893.55(4)."

Sec. 893.55(4)(a) defines noneconomic damages to mean:

"Moneys intended to compensate for pain and suffering; humiliation; embarrassment; worry; mental distress; noneconomic effects of disability including loss of enjoyment of the normal activities, benefits and pleasures of life and loss of mental or physical health, well-being or bodily functions; loss of consortium, society and companionship; or loss of love and affection."

Sec. 893.55(4)(b) provides:

"The total noneconomic damages recoverable under ch. 655 for bodily injury or death. . .may not exceed the limit under par. (d) for each occurrence from all health care providers. . .who are found negligent. . ."

Sec. 893.55(4)(d) reads:

"The limit on total noneconomic damages for each occurrence under par. (b) shall be $1,000,000.00 for actions filed on or after June 14, 1986, . . ."

Defendants contend that the applicable noneconomic limitation on a death claim is governed by the wrongful death statute rather than by Sec. 893.55. Defendants argue that the general purpose of ch. 655 was to limit rather than enhance medical malpractice liability exposure. As evidence thereof, defendants make reference to the legislative findings set forth in ch. 37 of the laws of 1975, which findings clearly demonstrate concerns over the adverse effects of malpractice claims and suits on the costs and availability of health care in Wisconsin. With these concerns in mind the Court is asked to assume that the legislature never intended to cap a noneconomic death claim arising from medical malpractice at $1,000,000.00 while limiting noneconomic death claims caused by other torts to $50,000.00. Though it may be difficult to understand why the relatives of a person killed by a drunk driver or as the result of the negligent use of a firearm should be limited to a claim of $50,000.00 for loss of society and companionship while a death resulting from the negligence of a health care provider would entitle such relatives to a claim for loss of society and companionship of up to $1,000,000.00, that is not to say that the legislature did not intend to extend the cap to $1,000,000.00 in medical malpractice actions. It may have done so because of the insurance provisions contained in ch. 655, because of trade offs among competing interests as suggested by plaintiff's counsel or for any number of other reasons. Though the reasons for the legislative $1,000,000.00 cap on medical malpractice claims may not have been specified, to conclude that the phrase "or death" was a legislative oversight or mistake is only speculation.

While it is true that a Court, in construing the statute must give effect to the intent of the legislature, it is not at liberty to disregard the plain and clear words of the statute. Rules of statutory interpretation applicable when ambiguity is present need not be called into play when the language of the statute speaks for itself.

Sec. 655.017 is clear in stating that the amount of noneconomic damages recoverable by a claimant under ch. 655 is subject to the limit specified under Sec. 893.55(4). Sec. 893.55(4) is equally clear in stating that the total noneconomic damages recoverable under ch. 655 for *bodily injury or death* may not exceed $1,000,000.00. The Wisconsin wrongful death statute has been in existence for many years prior to the enactment of Sec. 655.017 and had the legislature sought to cap the damages in a death claim under that statute it could have done so. It not only elected not to do so, but enacted legislation in direct conflict with the manner of treating an award involving contributory negligence under the wrongful death statute. The wrongful death statute requires the Court to reduce any award to the $50,000.00 maximum and then where applicable reduce that maximum figure under Sec. 895.045 statutes in proportion to the amount of negligence attributable to the person recovering. On the other hand such award in a medical malpractice action is not, under Sec. 893.55(c), reduced to the statutory maximum prior to the application of Sec. 895.045 statutes. It is then reduced to the maximum only if the award as reduced under Sec. 895.045 still exceeds the $1,000,000.00 limitation. Such legislation suggests that the legislature was not satisfied to cap a noneconomic medical malpractice claim under the then existing wrongful death statute.

Though the Court may not agree with the capping difference of a medical malpractice claim, it may not rewrite the law. That is the function of the legislature.

Though no challenge has been made under the equal protection clause of the constitution, it appears that such difference was not an abuse of legislative discretion.

Therefore, it is the conclusion of this Court that the applicable limitation on the death claim is as specified under Sec. 893.55 statutes.

Dated this 9th day of March, 1988.

BY THE COURT:

/s/ Richard H. Stafford
Richard H. Stafford
Circuit Judge

Supreme Court, U.S.
FILED
DEC 20 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-883

In the

Supreme Court of the United States

October Term, 1990

LEONARD C. JOHNSON, CRNA, LUTHER HOSPITAL, ST. PAUL FIRE & MARINE INSURANCE COMPANY, and WISCONSIN PATIENTS COMPENSATION FUND,
Petitioners,

v.

RICKY F. RINECK, Individually, as surviving husband of Joy E. Rineck, and as guardian for Rachel J. Rineck, a minor,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court will review a state supreme court's construction of state statutes in a case where constitutional arguments were raised for the first time in a motion for reconsideration and the state supreme court refused to consider them.

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OPINIONS BELOW

The petition accurately cites the opinions below.

JURISDICTION

Jurisdiction is sought under 28 U.S.C. § 1257(a). As discussed in Part I of the Argument below, Respondents contend this Court lacks jurisdiction because the federal question was not timely raised.

STATEMENT OF THE CASE

This case involves injuries to a child and the death of her mother on account of admitted medical malpractice during the child's delivery by cesarean section on January 27, 1986. Petitioners are the involved nurse anesthetist, the hospital, and their insurers. Respondents are the surviving spouse and his birth-injured child.

In Wisconsin, claims for "injury or death on account of malpractice" are controlled by Wisconsin Statutes Chapter 655, the Health Care Liability and Patients Compensation Act.[1] In April, 1986, Respondents filed suit under that law. The damages Respondents sought included compensation for the father's loss of spousal society and companionship. Chapter 655 subjects all noneconomic loss claims for injury or death on account of malpractice to a $1,000,000 limit.[2]

By agreement, the claims involving the mother's death and those involving the child's injuries were bifurcated and the former were scheduled for trial. Five months before trial, in January, 1988, Petitioners moved (R18) to further restrict the father's claim for loss of spousal society and companionship by arguing that the noneconomic loss

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[1] Wisconsin Statutes Section 655.007 provides:

> On or after July 24, 1976, any patient or the patient's representative having a claim or any spouse, parent or child of the patient having a derivative claim for injury or death on account of malpractice is subject to this chapter.

[2] These capping provisions, Wisconsin Statutes Sections 655.017 and 893.55(4), are set forth in the Petition at 3-4.

limitation contained in Wisconsin's general wrongful death statute[3] should be grafted onto the $1,000,000 limit already imposed by Chapter 655. Petitioners presented the issue to the trial court as "a straightforward case of statutory interpretation, in which constitutional issues did not need to be raised," *Petition* at 25. After oral arguments, the trial court issued a Memorandum Order[4] on March 9, 1988, in which Petitioners' motion was denied. The trial court held that, in medical malpractice actions involving death, the general wrongful death statute's limitation on loss of society and companionship is preempted by the conflicting limit imposed by the medical malpractice laws.

After trial resulted in a jury award of $250,000 for loss of spousal society and companionship, Petitioners renewed their motion (R45) to impose the general wrongful death noneconomic damages cap. They again chose to cast the issue solely in terms of statutory construction. The motion, again, was denied.

Petitioners then took the issue to Wisconsin's intermediate court of appeals. In their briefs to the Wisconsin Court of Appeals, Petitioners continued to treat the question of conflicting damages caps as one involving only statutory construction.[5] The Wisconsin Court of Appeals reversed without hearing oral arguments. The Wisconsin Court of Appeals did not address constitutional issues because no such issues had been raised.[6]

When Respondents petitioned the Wisconsin Supreme Court for review, Petitioners opposed review by arguing that there are no " 'special and important reasons' for the court's involvement."[7] When the state supreme court agreed

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[3] See Petition at 3 for the text of the general wrongful death law.

[4] Petitioners' Appendix at A-49.

[5] Respondents' Appendix at A-2 contains Petitioners' statement of issues to the Wisconsin Court of Appeals.

[6] The Wisconsin Court of Appeals' decision is reproduced in Petitioners' Appendix at A-38.

[7] The pertinent portions of the Response to Petition for Review are set out in Respondents' Appendix at A-4.

to hear the matter, Petitioners neither briefed[8] nor argued constitutional claims. On June 14, 1990, the Wisconsin Supreme Court issued its unanimous decision[9] affirming the trial court's ruling on the applicable damages cap and reinstating the amount awarded by the jury for loss of spousal society and companionship. The Wisconsin Supreme Court disposed of the issue in exactly the same way as had the trial court, as a straightforward matter of statutory construction. No constitutional issues were discussed by the state supreme court because none had been raised in that court either.

At that point, Petitioners filed a motion for reconsideration[10], arguing for the first time, *Petition* at 11, that the Wisconsin state courts' construction of the medical malpractice statutes violates the equal protection clauses of the Wisconsin and United States constitutions. Respondents opposed reconsideration on the grounds that the constitutional claims were frivolous and because they had not been timely raised in compliance with Wisconsin procedural rules.[11] On September 13, 1990, the Wisconsin Supreme Court denied the motion for reconsideration without opinion.

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[8]Respondents' Appendix at A-7 contains Petitioners' Statement of issues to the Wisconsin Supreme Court.

[9]Petitioners' Appendix at A-1.

[10]Petitioners' Appendix at A-20.

[11]Respondents' Appendix at A-9 reproduces the Memorandum in Opposition to Reconsideration filed in the Wisconsin Supreme Court.

ARGUMENT

I.

THE PETITION SHOULD BE DENIED BECAUSE THE FEDERAL QUESTION WAS RAISED TOO LATE.

In four years of litigation at every level of the Wisconsin courts, Petitioners never raised a constitutional claim. Five times in the state courts they argued about the Wisconsin legislature's special treatment of noneconomic damages in medical malpractice actions involving death without once mentioning a claim based upon equal protection. On the sixth opportunity, and only when certiorari to this Court was their last hope, did Petitioners try to inject a constitutional issue into this case through a motion for reconsideration that was summarily denied.[12]

"Nothing is better settled than it is too late to raise a federal question for the first time in a petition for rehearing after the final judgment of the state court of last resort." *Consolidated Turnpike Co. v. Norfolk & Ocean View Ry. Co.*, 228 U.S. 326, 334 (1913). This Court consistently has followed that rule, except in those few cases where the decision of the state's highest court "unexpectedly" introduced the federal question into the case. *Saunders v. Shaw*, 244 U.S. 317, 320 (1917). The test is whether the federal claim was raised "at the first opportunity." *Missouri v. Gehner*, 281 U.S. 313, 320 (1930). In this case it was not.

In January, 1988, Petitioners first asked the trial court to consider whether the legislature "intended to cap a noneconomic death claim arising from medical malpractice at $1,000,000, while limiting noneconomic death claims

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[12]The Wisconsin Supreme Court refuses to hear constitutional questions raised for the first time on a motion for reconsideration absent compelling reasons for doing so. *State ex rel. Wisconsin Trust Co. v. Phelps*, 172 Wis. 147, 178 N.W.2d 471 (1920); *Sambs v. City of Brookfield*, 66 Wis.2d 296, 314, 224 N.W.2d 582, 592 (1975). As this court has often done in the past, it should refuse jurisdiction in this case, because Petitioners failed to pursue their federal constitutional rights in compliance with reasonable state procedural requirements. *See, Hedgebeth v. North Carolina*, 334 U.S. 806 (1948).

caused by other torts to $50,000."[13] Enroute to his decision, the trial judge wrote:

> Though no challenge has been made under the equal protection clause of the constitution, it appears that such difference was not an abuse of legislative discretion.[14]

At least from that time onward, Petitioners consciously chose to forego the opportunity to pursue issues of federal and state constitutional law. Contrary to their assertions, the case was not "changed in the Wisconsin Supreme Court," *Petition* at 27. As a review of the trial court and state supreme court opinions shows, the state supreme court merely reinstated the trial court's decision by following the trial court's analytical approach. It cannot be argued with candor that the opportunity to raise federal claims first arose after the decision by the state supreme court. The first opportunity to do so then was long past. This fatal jurisdictional defect requires the denial of certiorari in this case.

II.
THE PETITION ALSO SHOULD BE DENIED BECAUSE THE CASE DOES NOT PRESENT AN IMPORTANT FEDERAL QUESTION.

The only real issue in this case is the construction of state statutes: Does the specific state legislation governing claims for injury or death on account of medical malpractice preempt Wisconsin's general wrongful death law? A state court's construction of the state's own statutes is not reviewable by the United States Supreme Court:

> Under the settled rule of this Court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest court of the State fixing the meaning of the state legislation, as

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[13] Trial court Memorandum of March 8, 1988, Petitioners' Appendix at A-51.

[14] *Id.* at A-53.

> though such meaning has been specifically expressed therein. [Citations omitted.] And we follow the state construction even though it may not agree with our own opinion. [Citations omitted.]

Supreme Lodge, Knights of Pythias v. Meyer, 265 U.S. 30, 32-33 (1923). When the state court's construction of its own state law is involved in a constitutional challenge, this Court is bound to follow that construction. *Guaranty Trust Co. v. Blodgett*, 287 U.S. 509 (1933). Thus, the only question for this Court is whether the Wisconsin law, as interpreted by the Wisconsin Supreme Court, resulted from a constitutionally permissible exercise of legislative authority. It clearly did; and this legislative activity raises no new or important federal questions, as the following cases show.

In *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978), this Court upheld the legislative imposition of liability limitations that were part of a comprehensive scheme for promoting a particular industry while protecting the public. This kind of legislation is "a classic example of an economic regulation"; it is entitled to "'a presumption of constitutionality.'" 438 U.S. at 83 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1963)). "[S]tatutes limiting liability are relatively commonplace and have consistently been enforced by the courts" because "the 'Constitution does not forbid the creation of new rights or the abolition of old ones recognized by the common law, to attain a permissible legislative objective.'" 428 U.S. at 88 n. 32 (quoting *Silver v. Silver*, 280 U.S. 117, 122 (1929)). After restating these principles, this Court held:

> [W]e conclude that there is no equal protection violation. The general rationality of the Price-Anderson Act liability limitations . . . is ample justification for the difference in treatment between those injured in nuclear accidents and those whose injuries are derived from other causes.

428 U.S. at 93. *Duke Power* dictates the result in this case.

Petitioners admit that they have "no vested interest or property right" in the general wrongful death statute's noneconomic damages limitation. *Petition* at 15. Accordingly, they have no cause for constitutional complaint over that statute's preemption in medical malpractice cases. Even where statutory entitlements are concerned, legislatures have the "power to substitute a different, less valuable entitlement at a later date," *Atkins v. Parker*, 472 U.S. 115, 129 (1985). Legislatures can revise remedies, *Duke Power, supra*. They can reduce or eliminate preexisting causes of action, *Logan v. Zimmerman*, 455 U.S. 422 (1982). And they can redefine a defendant's exposure without offending the Constitution for the same reason.

The Wisconsin Supreme Court observed that Chapter 655 is like a workers' compensation law in that it modifies general civil law in order to meet "specific economic and social needs," *Rineck v. Johnson*, 155 Wis.2d 659, 665, 455 N.W.2d 336, 339 (1990). Healthcare providers under Chapter 655, like employers affected by the workers' compensation laws, are treated differently in furtherance of social policy objectives. More than seventy years ago, in *New York Central Ry. Co. v. White*, 243 U.S. 188 (1917), this Court decided that this type of legislation clearly is constitutional. There is no reason for the Court to exercise its discretionary jurisdiction in order to restate this principle here.

One of the two laws creating this dispute is just a few weeks from sunset. Wisconsin Statutes Section 655.017 (set forth in the Petition at 3) provides that the medical malpractice noneconomic damages caps are only in effect "before January 1, 1991." After the new year, the interaction between Wisconsin's general wrongful death statute and the state's specific medical malpractice laws will present entirely different questions. Under the circumstances, there are absolutely no "special and important reasons" for discretionary review by the United States Supreme Court. Sup. Ct. R. 10.

Even if this case presented an issue of continuing interest in Wisconsin, it would have no national importance. Petitioners admit that the conflict between these two

Wisconsin statutes presents a "narrow framework" for consideration of constitutional questions. *Petition* at 12. However, they contend that it provides an opportunity for solving constitutional problems that are common to the various state statutes addressing medical malpractice. A review of the statutes and cases Petitioners cite shows that, in fact, no other state shares the constitutional "problem" Petitioners raise in this case.

No two states' malpractice laws are identical. Some states have addressed malpractice problems by enacting across-the-board damages limits; others have enacted limits only on noneconomic damages; still others have imposed special procedures for prosecuting claims, but no damages limits.[15] In each instance, these state statutes interact with other peculiar local laws and with particular provisions of the involved state constitutions. As would be expected, the decisions addressing these statutes are equally varied. While Petitioners cite thirty different state caps statutes, they can find only fifteen states in which these statutes faced a constitutional challenge of any kind. *Petition* at 22-23. Of those fifteen local decisions, five decide the constitutionality of the involved legislation solely on *state* constitutional grounds.[16] Two apply the wrong standard of review in analyzing the involved statutes under the United

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[15] A convenient review of state legislative responses to the "malpractice crisis" is found in Smith, "Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws," 35 Def.L.J. 359 (1986). The author concludes: "In short, under the federal constitutional standard, damages caps in medical malpractice actions would almost certainly pass constitutional muster under existing equal protection and due process theories." *Id.* at 389.

[16] *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980); *Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, 757 P.2d 251 (1988); *Lucas v. United States*, 757 S.W.2d 686 (Tex. 1988); *Smith v. Dept. of Ins.*, 507 So.2d 1080 (Fla. 1987); *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 771 P.2d 711 (1989).

States Constitution.[17] Six involve damages limitations entirely unlike the one encountered in this case.[18] One involves no damages limitations at all.[19] Another involves only a Seventh Amendment challenge to a cap on noneconomic damages in *all* tort cases.[20] The only decision considering a limitation on noneconomic damages in medical malpractice under the United States Constitution while applying the correct ("rational basis") standard of review concludes that such a limitation *is* constitutional.[21] And, as Petitioners admit, no other case involves the relationship between conflicting malpractice and wrongful death damages limitations. Because there is no common constitutional question, there is no issue of national importance. As it has done when asked to enter this field on two prior occasions,[22] the Court should again refuse to do so at this time.

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[17] Petitioners agree that federal equal protection claims involving the kind of socio-economic legislation that is involved here are to be reviewed under a rational basis standard. *Petition* at 14-17. In the following cases, "middle tier scrutiny" was erroneously used to decide federal equal protection questions: *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *Jones v. State Board of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied* 431 U.S. 914 (1977).

[18] *Duren v. Suburban Community Hospital*, 24 Ohio Misc.2d 25, 495 N.E.2d 51 (C.P. Ohio 1985)l *Etheridge v. Medical Center Hospital*, 237 Va. 87, 376 S.E. 2d 525 (1989); *Johnson v. St. Vincent Hospital* 404 N.E.2d 585 (Ind. 1980); *Lucas v. United States, supra; Sibley v. Board of Supervisors of L.S.U.*, 462 So. 2d 149 (La. 1985); *Wright v. Central Du Page Hospital Ass'n*, 63 Ill.2d 313, 347 N.E.2d 736 (1976).

[19] *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977).

[20] *Franklin v. Mazda Motor Corp.*, 704 F.Supp 1325 (D.Md. 1989).

[21] *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 211 Cal. Rptr. 368, 695 P.2d 655 (1985), *appeal dismissed* 474 U.S. 892 (1985).

[22] *Jones v. State Board of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976), *cert denied* 431 U.S. 914 (1977); *Fein v. Permanente Medical Group*, 38 Cal.3d 137, 211 Cal.Rptr. 368, 695 P.2d 655 (1985), *appeal dismissed* 474 U.S. 892 (1985).

III.
REMAND IS UNNECESSARY AND IMPROPER.

In refusing to address the constitutional question Petitioners first raised in their motion for reconsideration, the Wisconsin Supreme Court followed longstanding state procedural rules:

> The court has consistently held that it will not entertain a constitutional issue raised for the first time on appeal unless there is some compelling reason for doing so.

Sambs v. City of Brookfield, 66 Wis.2d 296, 314, 224 N.W.2d 582, 592 (1975). In Wisconsin, a claim, made for the first time after the supreme court's decision, that a statute and its application are unconstitutional will not be considered because "the question is presented too late." *State ex rel. Wisconsin Trust Co. v. Phelps*, 172 Wis. 147, 147, 178 N.W. 471 (1920). In determining its own jurisdiction, this Court defers to state requirements for presenting federal constitutional claims. *Hedgebeth v. North Carolina*, 334 U.S. 806 (1948). The same reasonable requirements should apply in addressing a request for remand.

In any event, remand would serve no purpose, other than to further unnecessarily delay this case's resolution. This is not like the situation in the case Petitioners cite, in which remand for fact-finding might avoid a constitutional issue entirely. *Wood v. Georgia*, 450 U.S. 261 (1981). As Petitioners put it, "[t]he material facts of this matter are undisputed." *Petition* at 5. Nor is this a case where the state court refused to address an issue that had been properly raised. *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951). Instead, this case presents a federal constitutional question that the state court refused to hear for good reason, and which this Court has already answered time and time again. Under the circumstances, we respectfully submit that, like the petition for certiorari, the request for remand is equally inappropriate and should be refused.

CONCLUSION

The attempt to inject a federal question on a motion for reconsideration, long after the first opportunity arose, does not confer jurisdiction on this court. The sole issue in this case involves construction of state tort statutes, an area this Court does not approach. No federal constitutional question exists in this case because a state legislature's right to fashion remedies in furtherance of social policy is well settled. The petition should be denied.

Respectfully submitted,

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Court of Appeals of Wisconsin

DISTRICT III

RICKY F. RINECK, Individually, as Surviving Husband of JOY E. RINECK, and as Guardian for RACHEL J. RINECK, a Minor,

Plaintiffs-Respondents-Cross Appellants,

vs.

Case No. 88-1555

LEONARD C. JOHNSON, CRNA, LUTHER HOSPITAL, ST. PAUL FIRE & MARINE INSURANCE COMPANY and WISCONSIN PATIENTS COMPENSATION FUND,

Defendants-Appellants-Cross Respondents,

and

BLUE CROSS BLUE SHIELD UNITED OF WISCONSIN,

Defendant.

APPEAL FROM CIRCUIT COURT
CHIPPEWA COUNTY, CASE NO. 86-CV-378
HONORABLE RICHARD H. STAFFORD, PRESIDING

BRIEF AND APPENDIX OF DEFENDANTS-APPELLANTS

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Supreme Court of Wisconsin

RICKY F. RINECK, Individually, as Surviving Husband of JOY E. RINECK, and as Guardian for RACHEL J. RINECK, a Minor,
Plaintiffs-Respondents-Cross-Appellants-Petitioners,
vs.

Appeal No. 88-1555

LEONARD C. JOHNSON, CRNA, LUTHER HOSPITAL, ST. PAUL FIRE & MARINE INSURANCE COMPANY and WISCONSIN PATIENTS COMPENSATION FUND,
Defendants-Appellants-Cross-Respondents,
and

BLUE CROSS BLUE SHIELD UNITED OF WISCONSIN,
Defendant.

RESPONSE TO PETITION FOR REVIEW AND APPENDIX

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The Wisconsin Supreme Court attempts to devote its attention to cases presenting "special and important reasons" for the court's involvement. Sec. 809.62(1), Wis. Stats. Although the Petition for Review in the instant case is repleat with rhetorical flourish arguing the importance of the issues presented, a straightforward analysis of the case reveals that it was decided by the Court of Appeals according to well-settled principles of Wisconsin law. As to each of the three issues raised by the petitioners, the Supreme Court should deny review.

I. THE COURT OF APPEALS PROPERLY APPLIED WELL-SETTLED RULES OF STATUTORY CONSTRUCTION TO RECONCILE PROVISIONS OF THE WRONGFUL DEATH STATUTES AND MEDICAL MALPRACTICE STATUTES.

The Petition for Review correctly reports that the Court of Appeals determined that Sec. 895.04(4), Wis. Stats., limits recovery for loss of society and companionship in a wrongful death action to $50,000.00, in medical malpractice actions as well as other actions for wrongful death. Petitioners somewhat mischaracterize the Decision of the Court of Appeals, however, by seizing the discussion of legislative intent in that decision, as if that were the basis of the Decision. Petition for Review at 11. Petitioners argue that it is important for the Supreme Court to "clarify" what the petitioners contend are conflicting statutory limitations on damages found in Secs. 895.04(4) and 893.55(4), Wis. Stats. Petition for Review at 5.

In point of fact, this issue does not present any strong reason for involvement of the Wisconsin Supreme Court. A plain reading of the Decision of the Court of Appeals demonstrates that the Court of Appeals expressly found the statutes to be not ambiguous and **not** in conflict. Decision of Court of Appeals at 7. Ap. 107. The Court of Appeals used well-settled principles of statutory construction to reconcile the limitation on recovery for loss of society and companionship in a wrongful death action contained in

Sec. 895.04(4), Wis. Stats, with the "cap" placed on noneconomic damages in medical malpractice cases contained in Sec. 893.55(4), Wis. Stats. In other words, there is no need to either "clarify" or "harmonize" any confusion in Wisconsin law. This issue does not meet the criteria for review set forth in Sec. 809.62(1)(c), Wis. Stats.

II. THE ISSUE OF A CHILD'S CLAIM FOR LOSS OF SOCIETY AND COMPANIONSHIP OF A PARENT WHICH PETITIONERS NOW PRESENT TO THE SUPREME COURT WAS NOT PRESENTED TO EITHER THE TRIAL COURT OR THE COURT OF APPEALS.

The petitioners assert that the opinion in *Theama v. City of Kenosha*, 117 Wis.2d 508, 344 N.W.2d 513 (184) gives a minor child a claim for the loss of society and companionship of an injured parent, and then argues that "the lower court's decisions would deny recovery for loss of parental society and companionship in cases where death follows long after the original "injury." Petition for Review at 13, this, the petitioners argue, would "obstruct implementation of the policy established in *Theama*." Petition for review at 13.

Supreme Court of Wisconsin

RICKY F. RINECK, Individually, as Surviving Husband of JOY E. RINECK, and as Guardian for RACHEL J. RINECK, a Minor,
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vs.

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Defendant.

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ARGUMENT 5

I. THE $50,000.00 STATUTORY LIMITATION ON DAMAGES FOR LOSS OF SOCIETY AND COMPANIONSHIP RESULTING FROM WRONGFUL DEATH IS APPLICABLE IN AN ACTION FOR MEDICAL MALPRACTICE. 5

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Supreme Court of Wisconsin

RICKY F. RINECK, Individually, as Surviving Husband of JOY E. RINECK, and as Guardian for RACHEL J. RINECK, a Minor,
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Defendants-Appellants-Cross Respondents,
and

BLUE CROSS BLUE SHIELD UNITED OF WISCONSIN,
Defendant.

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION

Arguing that the medical malpractice act, Ch. 655, Stats., is itself constitutional but that following its express directions violates equal protection, defendants ask this court to address constitutional issues for the first time after appeal. Petitioner Rineck opposes this inappropriate request for "reconsideration" for the reasons set forth below.

I.

DEFENDANTS ARE NOT ENTITLED TO RAISE CONSTITUTIONAL ISSUES AT THIS STAGE OF THE CASE.

The dispositive issues on appeal have been at issue since January 1988, when defendants first asked the trial court to consider the relationship between the medical malpractice and wrongful death statutes. The relationship has been considered at least five times by all three levels of this state's courts since then. Although the issues on appeal were first decided more than two years ago, defendants waited until after an adverse decision by the Supreme Court to add that they think there are constitutional problems when the general wrongful death statute is held inapplicable in medical malpractice actions. Constitutional claims were never mentioned, let alone briefed or argued before this court's decision of June 14, 1990. Contrary to Sec. 806.04(11), Stats., the attorney general was never given notice that a constitutional issue was involved; consequently, the attorney general has not participated in this case.

A constitutional issue may be waived by failure to raise it in a timely manner. *Bradley v. State,* 36 Wis.2d 345, 153 N.W.2d 38 (1967). A constitutional issue should not be addressed where the attorney general has not been given notice. *Tieberg v. Ehlke,* 137 Wis.2d 228, 235 n8, 404 N.W.2d 84 (Ct. App. 1987). The Wisconsin Court of Appeals has said that the appellate courts "will not consider an issue raised for the first time on appeal, *especially a claim that a statute is unconstitutional.*" *Tomah-Mauston Broadcasting Co. v. Eklund,* 143 Wis.2d 648, 657-58, 422 N.W.2d 169 (Ct. App. 1988). The Supreme Court has agreed:

> This Court has consistently held that it will not entertain a constitutional issue raised for the first time on appeal unless there is some compelling reason for doing so.

Sambs v. City of Brookfield, 66 Wis.2d 296, 314, 224 N.W.2d 582, 592 (1975) (citations omitted). Applying this rule, the Supreme Court has refused to address constitutional issues

that have not been raised before in the vast majority of cases in which it has been asked to do so. *See, Racine Steel Castings v. Hardy*, 144 Wis.2d 553 nl, 426 N.W.2d 33 (1988); *State v. Marshall*, 113 Wis.2d 643, 335 N.W.2d 612 (1983); *Laufenberg v. Cosmetology Examining Bd.*, 87 Wis.2d 175, 274 N.W.2d 618 (1979); *Chrylser Corp. v. Adamatic, Inc.*, 59 Wis.2d 219, 208 N.W.2d 97 (1973); *City of Milwaukee v. The Shoup Voting Machine Corp.*, 54 Wis.2d 549, 196 N.W.2d 694 (1972); *Resseguie v. American Mut. Liability Ins. Co.*, 51 Wis.2d 92, 186 N.W.2d 236 (1971); *Dostal v. Magee*, 273 Wis. 228, 77 N.W.2d 604 (1956). Rineck respectfully submits that the court should refuse to do so in this case as well.

II.

IT IS WHOLLY INAPPROPRIATE TO ARGUE CONSTITUTIONALITY FOR THE FIRST TIME ON A MOTION FOR RECONSIDERATION.

By its nature, "reconsideration" involves a second look at something seen before. As this court said in *Uren v. Purity Dairy Co.*, 252 Wis. 446, 459b, 33 N.W.2d 213 (1948), where an argument never surfaced before a motion for reconsideration, "there is nothing to reconsider." This court has observed that one of the "well-defined rules applicable on rehearing" is that an issue that was not pled, argued or briefed at any time before "will not properly be at issue" on a motion for reconsideration. *Bump v. Dahl*, 27 Wis.2d 607, 608, 134 N.W.2d 665 (1965). Accordingly, this court has refused to "reconsider" an issue raised at the trial court but abandoned on appeal, *Martinson v. Brooks Equipment Leasing Co.*, 36 Wis.2d 209, 154 N.W.2d 353 (1967); it has refused to "reconsider" an issue that had never before been mentioned, *Hope Acres, Inc. v. Harris*, 27 Wis.2d 285, 134 N.W.2d 462, 135 N.W.2d 775 (1965), *Bump, supra, Uren, supra, State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 61 N.W.2d 300 (1953); and this court specifically has refused to "reconsider" a claim, made for the first time after the Supreme Court's decision, that a statute and its application were unconstitutional, *State ex rel. Wisconsin Trust Co. v.*

Phelps, 172 Wis. 147, 147, 178 N.W. 471 (1920), holding that, after the Supreme Court has ruled, "the question is presented too late." Rineck respectfully submits that the court should reach the same conclusion here.

III.

DEFENDANTS' REQUEST FOR RECONSIDERATION DOES NOT SATISFY THE EXCEPTIONAL CONDITIONS REQUIRED BY THE SUPREME COURT.

Even in those rare instances where this court has considered a constitutional issue raised for the first time on appeal, it has never done so where the issue was raised for the first time on a motion for reconsideration. And, when the court has considered a constitutional issue raised first on appeal, it has required "some compelling reason for doing so," *Sambs, supra* at 314. This court has determined that it will only consider a newly raised constitutional issue "if *it is in the interests of justice* to do so, if both parties have had *an opportunity to brief* the issue, and if there are *no factual issues* that need resolution," *Laufenberg, supra* at 187. The present motion fails this test.

A. The interests of justice.

"The interests of justice" are not served by allowing a party to *intentionally withhold* an issue that has been on the table since before trial and then inject that issue as its "ace in the hole" after losing on appeal. *See, Gasaway v. Pendergrass*, 350 S.W.2d 460 (Ky. 1961) (known trial court error held back "to see if it became an issue"). Defendants made no constitutional claims when questions regarding the relationship between Ch. 655 and the general wrongful death statute originally were presented, and they chose not to make any during post-trial motions or before either of the appellate courts. In fact, when faced with Rineck's Petition for Review, defendants wrote that Supreme Court review was unnecessary because there were "no 'special and important reasons' for the court's involvement" in this case.

Response to Petition for Review at 1. In light of their earlier treatment of these issues, it is difficult to see how defendants can argue that there is "some compelling reason" for addressing them now.

Reconsideration is appropriate where there is an ambiguity in the mandate or opinion, *Johann v. Milwaukee Electric Tool Corp.*, 270 Wis. 573, 579, 72 N.W.2d 401, 405 (1955), or where the court has applied the wrong law or reached the wrong legal conclusion, *Maloney v. Industrial Commission*, 242 Wis. 165, 9 N.W.2d 623 (1943). Reconsideration is not appropriate where the movant has merely dressed his old arguments in new clothes, *Id.*

Calling it an equal protection problem, defendants have simply renewed their old, unsuccessful argument that medical malpractice actions involving death are "actions for wrongful death" governed by the general wrongful death statute. They argue that:

> The court's interpretation of the law divides tort victims *in wrongful death actions* into two classes: victims of health care providers and victims of all other tortfeasors. Since there is no rational basis for the resulting inequities, this interpretation of the law violates . . . equal protection.

Memorandum in Support of Motion for Reconsideration at 2. (Emphasis added.)

Guided by the plain language of Chapter 655, this court determined that medical malpractice cases involving death are *not* "wrongful death actions;" rather, they are part of a *separate class* consisting of all medical malpractice claims regardless whether "injury or death" is involved. The court has not "divid[ed] tort victims in wrongful death actions into two classes;" rather, the legislature has taken malpractice death claims outside the wrongful death statute altogether. Defendants overlook this point and, in doing so, they overlook the fact that it is impossible to simultaneously argue that this legislation is itself constitutional, *Defendants' Memorandum* at 13-14, but that this court's reading of it is not.

Earlier, defendants tried to convince this court that the sole purpose of Chapter 655 was to limit health care providers' liability. They did not succeed. Reading Chapter 655 in its own terms, the court viewed this legislation as a unified system for balancing competing interests. *Rineck v. Johnson,* Slip op. at 7. Judge Stafford reached the same conclusion, *Memorandum Order* dated March 9, 1988 at 3, and no constitutional attack was raised. In order to raise constitutional issues now, defendants simply revert to their unsuccessful argument that Chapter 655's *sole purpose* was capping awards, and they combine that argument with their often argued belief that malpractice death claims are "actions for wrongful death." They contend that by subdividing wrongful death actions into those caused by malpractice and those with other causes, this court creates a classification that is "completely contrary to the legislative purpose" of limiting awards; thus, that classification violates the equal protection clause. *Defendants' Memorandum* at 8-9. They miss the point that, for many reasons, "*the legislature* intended to set medical malpractice cases involving death apart from other death cases to which the general wrongful death statute applies." *Rineck* slip op. at 13. (Emphasis added.)

As defendants' own authority explains, even these old, misguided arguments do not create a constitutional issue. Defendants concede that a statute providing different remedies for malpractice victims is constitutional so long as there is a rational basis for that law, *Defendants' Memorandum* at 6. They cite the court to *State ex rel. Strykowski v. Wilkie*, 81 Wis.2d 491, 261 N.W.2d 434 (1978), which held that Chapter 655 is, in fact, rationally based. They do not attack the constitutionality of Sec. 893.55(4), that part of Chapter 655 which imposes unique noneconomic damages limitations on all medical malpractice claims involving "injury or death," *Defendants' Memorandum* at 13-14. In fact, they cite the court to a California case that upholds the constitutionality of similar malpractice damages limitations, *Fein v. Permanente Medical Group,*

211 Cal. Rptr. 368, 695 P.2d 665 (1985), and to a law review article discussing why Wisconsin's medical malpractice damages limitations are clearly constitutional, *Comment, the Constitutionality of Wisconsin's Noneconomic Damage Limitation*, 72 Marq. L. Rev. 235 (1989).[1]

The authorities defendants cite quite clearly show that, if the legislature had a rational basis for taking malpractice death cases out from under the general wrongful death statute and for imposing unique damages limitations on those actions, that reclassification is constitutional. Having already failed in their effort to convince this court that the legislature intended the wrongful death statute to apply in medical malpractice cases, and having failed to convince this court that the legislature did not intend to treat "injury or death" in the same way under Chapter 655, defendants already have lost the constitutional battle they now try to start. As a result, justice does not require reconsideration of this case.

B. No opportunity to brief and argue.

Wisconsin's appellate courts routinely have refused to consider issues that have not been briefed and argued. *Uren, supra; Bump, supra; State ex rel. Thomson, supra; Martinson v. North Central Life Ins. Co.*, 65 Wis.2d 268, 225 N.W.2d 604 (1975); *City of Milwaukee v. The Shoup Voting Machine Corp., supra; Racine Steel Castings v. Hardy,*

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[1] According to the writer, the legitimate state objectives which the legislature reasonably could have promoted through unique damages limitations applicable to all medical malpractice claims include: assuring continued availability of quality health care, *Comment* at 244; reducing the effect of noneconomic loss awards on insurance rates, *Id.* at 247; promoting settlement by reducing incentives for trial, *Id.* at 247; increasing the collectibility of judgments, *Id.* at 253; and reducing insurance rates, *Id.* at 260 n.158. In its opinion, this court added another reason for reclassifying medical malpractice claims: "Chapter 655 recognizes that there is no logical distinction between injury or death claims arising out of medical malpractice." *Rineck* slip op. at 14. *See, also, Stanhope v. Brown County*, 90 Wis.2d 823, 280 N.W.2d 711 (1979) and *Sambs v. City of Brookfield*, 97 Wis.2d 356, 293 N.W.2d 504 (1980).

supra; Estate of Atkinson, 261 Wis. 481, 484, 53 N.W.2d 185, reh'g den. 261 Wis. 484, 54 N.W.2d 52 (1952); *Platta v. Flatley*, 68 Wis.2d 47, 63, 227 N.W.2d 898 (1975); *Sambs, supra; Laufenberg, supra.* Where this court has agreed to address a constitutional issue raised for the first time on appeal, it has done so only when that issue had been briefed, argued and examined by the Court of Appeals, *In the Interest of Baby Girl K*, 113 Wis.2d 429, 448, 335 N.W.2d 846 (1983); *State v. Popanz*, 112 Wis.2d 166, 332 N.W.2d 750 (1983). Rineck respectfully submits that this court should not depart from this well-founded requirement in the present case.

CONCLUSION

Rearguing their earlier-rejected positions that medical malpractice death cases are "actions for wrongful death" and that the sole pupose of Ch. 655, Stats. was to reduce health care providers' exposure, defendants attempt to inject a new constitutional issue after appeal. To do so, they blame this court for a classification that they call irrational, while simultaneously arguing that the legislation that, in fact, created that classification is rationally based. In support of their arguments, defendants offer authority that clearly indicates there is no real constitutional issue here. The court should see through this untimely request for reconsideration, and the tactical maneuvering that motivates it, and apply the "well-defined rules applicable on rehearing" to reject the defendants' motion so that this case can proceed to its long overdue conclusion.

Dated: July 13, 1990.

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Supreme Court, U.S.
FILED
JAN 7 1991
JOSEPH F. SPANIOL, JR.
CLERK

NO. 90-883

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1990

LEONARD C. JOHNSON, C.R.N.A.,
LUTHER HOSPITAL, ST. PAUL FIRE &
MARINE INSURANCE CO., AND WISCONSIN
PATIENT COMPENSATION FUND,

Petitioners,

vs.

RICKY F. RINECK, INDIVIDUALLY AND
AS SURVIVING HUSBAND OF JOY E. RINECK
AND AS GUARDIAN FOR RACHEL J. RINECK,
A MINOR,

Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE WISCONSIN SUPREME COURT**

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

Respondents' Brief in Opposition to the Petition for a Writ of Certiorari in this matter attempts to avoid any consideration of the merits of the constitutional question raised by first, overstating the nature of the "not pressed or passed on below" rule, and second, by mischaracterizing the issue raised in the Petition. Finally, Respondents suggest that consideration by the United States Supreme Court is unwarranted because the issue raised has "only" come before the Court three times in the last thirteen years.

I. CONSIDERATION OF THE CONSTITUTIONAL ISSUE RAISED IN THE PETITION IS NOT BARRED BY ANY JURISDICTIONAL RULE.

Respondents fully understand that there is a serious constitutional problem raised by the decision of the Wisconsin Supreme Court in this matter, and attempt to avoid this constitutional issue by changing the issue from one concerned with the merits to one concerned with procedure. *See* Respondents' *Brief in Opposition*, at i. Respondents argue that a "fatal jurisdictional defect requires the denial of certiorari in this case." *Brief in Opposition*, at 5. Respondents rather seriously overstate the case, however. The fact is, the United States Supreme Court has not decided "whether the 'not pressed or passed upon below' rule is jurisdictional . . . or prudential . . . or whether its character might be different in cases like this from its character elsewhere . . ." *Illinois v. Gates*, 462 U.S. 213, 222 (1983).

Application of any rule should take into account the purposes of the rule, and the "not pressed or passed on below" rule is no different. In *Illinois v. Gates, supra,* at 217-222, the Court discusses both the nature and purposes of the rule at some length. The fact is, consideration of the constitutional question raised by the Petition for Writ of Certiorari in this case does not contravene any of the purposes underlying the rule.

One of the purposes for the "not pressed or passed on below" rule is a concern that there be an adequate record. 462 U.S. at 221. In this case, however, Respondents concede that the material facts are undisputed. The holding of the Wisconsin Supreme Court has clearly created two separate, and unequal, classifications of wrongful death litigants, and the record is sufficient for consideration of the constitutional issue raised by this unequal classification system.

A second purpose underlying the rule is a concern for "due regard for the appropriate relationship" between the United States Supreme Court and the state courts. 462 U.S. at 221. This "due regard" requires that the state courts be given an opportunity to consider the constitutionality of the actions of state officials. However, in this case, it was the holding of the Wisconsin Supreme Court which first created the unequal classifications of litigants and *not* the conduct of any other state official. The first opportunity presented to consider the holding of the Wisconsin Supreme Court was upon a motion for reconsideration, and that opportunity was timely pursued. Moreover, the Wis-

consin Supreme Court's holding in this case is the only authority for the separate and unequal classifications, and therefore consideration of the constitutional issue by the United States Supreme Court will not imprudently impact on the stability of Wisconsin's law.

In short, neither the nature nor the purposes of the "not pressed or passed on below" rule should bar consideration of the clear-cut constitutional issue raised on the Petition for Writ of Certiorari in this case.

II. RESPONDENTS' BRIEF IN OPPOSITION MISCHARACTERIZES THE ISSUE PRESENTED.

In the Petition for Writ of Certiorari heretofore filed, Petitioners attempted to explain that, prior to the holding of the Wisconsin Supreme Court, "Petitioners had no reason to challenge the constitutionality of the 'cap' on medical malpractice damages, because Petitioners did not believe that that statute was unconstitutional." *Petition* at 25. The Petition goes on to explain that Petitioners still do not believe that the statute is unconstitutional. It is the decision of the Wisconsin Supreme Court, which effectively "turns the statute on its head," which Petitioners feel is unconstitutional. Without the decision of the Wisconsin Supreme Court, there would be only one classification of wrongful death damages, common to all Wisconsin litigants.

However, Respondents attempt to suggest that "the only real issue in this case is the construction of state statutes." *Brief in Opposition* at 5. Respondents

go on to argue that limitations on damages in medical malpractice actions (and by implication, other actions) may be rationally related to legitimate state interests, and are therefore constitutional. Respondents then suggest that, since this is so "cut and dried," there is no reason for the United States Supreme Court to review the decision of the Wisconsin Supreme Court in this case. Respondents' argument, however, seriously mischaracterizes the constitutional issue presented.

Petitioners do not challenge the authority of the Wisconsin legislature to limit damages, if such a limitation is rationally related to a legitimate state interest. That is *not* the issue presented in this case. In this case, the Wisconsin Supreme Court interpreted a statute designed to limit damages so that it, in fact, increased potential damage awards by a factor of 20. Even this would present no constitutional problems if the statute applied to all Wisconsin litigants. However, the decision of the Wisconsin Supreme Court applied the new increased damage limitation only to health care providers. Thus, the constitutional question actually presented in the Petition for Writ of Certiorari is whether or not the Wisconsin Supreme Court may impose a liability exposure of $1,000,000 in wrongful death actions against health care providers when, for all other Wisconsin litigants, the limit on liability is $50.000 for exactly the same loss.

CONCLUSION

Respondents agree with Petitioners that the appropriate standard of review in this matter would be application of the "rational basis" test. *Brief in Opposition*

at 6. Respondents further concede that the material facts in this matter are undisputed. *Brief in Opposition* at 10. The clear-cut constitutional issue presented by the Petition for Writ of Certiorari to the Wisconsin Supreme Court is whether or not the separate and unequal classifications created by the Wisconsin Supreme Court will withstand scrutiny. The fact that this case is at least the third such case to come before the United States Supreme Court in the last dozen or so years indicates that it is an ongoing, national problem.

Petitioners respectfully request that the Court grant the Petition, and issue its Writ of Certiorari to the Wisconsin Supreme Court.

Respectfully submitted this 4th day of January, 1991.

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